JAMMU AND KASHMIR

DIGEST

Civil Criminal & Revenue,

1947-1956

BY

T. R. Bhasin

ADVOCATE, PUNJAB, DELHI AND J & K HIGH COURTS

AND SUPREME COURT OF INDIA

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Dedicated to the sacred memory of my father Late Shri Gokal Chand Bhasin Advocate who passed away at Srinagar in 1947.

T. R. Bhasin

INDEX

Table of Cases

Accomplice — Evidence of — Corroboration by retractcd confession — Validity of —

A retracted confession is in itself a tainted piece of evidence and stands in need of corroboration and it is absolutely unsafe to seek corroboration of the accomplice's evidence by retracted confession : 3 J&K LR 132 and 3 J&K LR 172, Relied on.

Atta Mohd V. State AIR 1952 J&K 36 (H. C). D. B. Cr 1st Appeal No. 55 of 2006 D/- 15 Katik 2007

Accomplice — Who is — Necessity of corroboration of his evidence by independent witnesses.

The word accomplice has not been defined in the Evidence Act and must be taken in its ordinary sense. Ordinarily an accomplice means a guilty associate or a partner in a crime or who in some way or other is connected with the offence in question. The test that can be laid down, in order to see as to whether a particular witness is an accomplice or not is as to whether he can be Jointly indicted with the other accused in a particular case.

The evidence of one accomplice cannot be corroborated by that of another accomplice and in order to connect each accused with the offence, corroboration must be by independent evidence.

Ghulam Nabi & Ors. V. State. Cr Revn. No. 28 of 2006 D/- 9 Maghar 2006. AIR 1953 J&K 4 (H. C). S. B.

Accused - Examination of - Every error or omission does not vitiate a trial - Depends upon the degree of error and causing of prejudice to the accused.

Every error of omission not in compliance with the provisions of S. 342, Criminal P. C. does not vitiate trial and the question whether the trial is vitiated in each case depends upon the degree of the error and the prejudice it may have caused to the accused.

It is a binding principle of law that an accused person must be afforded an opportunity to explain any circumstances which might appear against him after recording the prosecution evidence.

In the instant case the accused were examined and opportunity as aforesaid was given to them after the prosecution evidence was recorded by a question being put to them in the following terms : "Have you heard the prosecution evidence that has been led against you ? Do you want to give any further statement ?" The accused stated in reply "I have heard the prosecution evidence. I have given a detailed statement on 12-3-2009. I do not want to give any further statement." It was contended that the questions put to the accused were defective in form and did not cover the points unfolded by the prosecution evidence against the accused and for which an opportunity should have been afforded to them to offer an explanation.

Held that there was force in that submission but not to the extent of holding that the trial itself was vitiated thereby. It would have been much preferable if the questions were in a more detailed form, but the questions and answers recorded in the case were not so genreal in form as to hold that any prejudice had been caused to the accused. AIR 1953 SC 76, Rel. on. AIR 1927 Lah 720, Distinguished.

Girdhari Singh & Ors V. The State, Cr. 2nd appeal No. 45 / 2011 D/- 16-3-1955, AIR 1955 J&K 22 (H. C). S. B.

Adverse possession - Co-sharers — Ouster for more than 12 years necessary.

It is a well established rule that to extinguish the right of a co-sharer by adverse possession of another co-sharer there must

be ouster for more than 12 years.
Kadir Kumar & Ors. (Defdt. Applt) Versus Mohammad Kumar & Ors. (Pltfs. Respdts) Civil Appeal No. 14 of 1946. 6 J&K LR 154 (Board of Judicial Advisers)

Adverse possession

Suit for interference with possession, the same having ripened into adverse possession. Plaintiffs recorded tenants-at-will in the revenue records and the defendants shown as proprietors-Plaintiffs also brought a suit in a Revenue Court contesting their liability to ejectment and demanding occupancy rights but plea of adverse possession not put forward.

Held that the mere non-payment of rent does not convert the cultivating possession of a tenat into adverse possession.
Satar & Ors V. Razak & Ors Civil Second Appeal No. 25 of 2005, 8 J&K LR 157 (H. C.) Single Bench.

Adverse possession —

Plea of adverse possession based on a transaction culminating in the execution of a deed of gift presented for registration but never registered — Plea that on the date of gift possession became adverse and exclusive — Parties co-sharers of land in dispute.

Held that the unregistered deed of gift did not convey any right to the donees nor, in the circumstances of the case, the character of the defendants' possession was in any way changed and that the defendants have throughout been in possession as co-charers on behalf of themselves and plaintiff.

Recitals in an invalid gift may be referred to as explaining the nature and character of the possession thenceforth held by the donee.

ILR 43 Mad. 244, AIR Rangoon 3 and 5 J&K Law Reporter 152, distinguished.
Thoppi Versus Paras Ram. Civil Appeal No 5 of 1950, 9 J & K L. R. 85 (Board of Judicial Advisors.)

Additional evidence by the appellate Court - Failure to record reasons - Effect of - Where found from the material on record that it was justified - No effect.

The contention that the lower appellate Court did not give any reasons for allowing the respondents to produce additional evidence is not tenable where it was found from the material on the record that there were circumstances which justified it to allow the party to adduce additional evidence.

1953 Mulla, O. 41, R. 27, XP. 1221 N. "Recording rulings in ('67) 11 Moo Ind App 345 (368) and AIR 1939 PC 152(154) and contrary views in AIR 1923 All. 413; AIR 1921 All 408, AIR 1915 Mad 588; 2 Ind Cas 995; AIR 1939 Bom 401 and AIR 1936 Lah 138 not noticed in Mulla).
Gh. Qadir & Ors V. Sultan & Ors 2nd Appeal No. 18 and Civil Revn. No. 113 of 2011 D/- 17-2-1955. AIR 1955 J&K 23 (H. C.) D. B.

Additional evidence - Considerations for appellate Court allowing it.

Ordinarily the appellate Court should not allow a party to adduce additional evidence to patch up the weak parts of his case and fill up the omissions by adducing additional evidence, but where the appellate Court finds that there was substantial cause for non-production of evidence in the lower Court and additional evidence is required to clear up a point in the interest of justice it may allow the party to produce addional evidence.

Held, in the circumstances of the case, that the lower appellate Court was perfectly justified in allowing the documents.

Anno : AIR Com. CPC ; 0. 41, R. 27 N, 4 : 1953 Mulla, 0. 41 R. 27, P. 1218 N. "When ..... admitted" (AIR 1937 Pat 584 which construes AIR 1931 PC 143 not noticed in Mulla).

AIR Com : CPC ; 0. 41. R. 27 N. 8 ; 1953 Mulla. 0. 41, R. 27, P. 1220 N. "Or.....cause" (13 Pts. extra in AIR Com. — Foot-notes in AIR Com. exhaustive — and illustrative — Views of other High Courts not noticed in Mulla).

Gh. Qadir & Ors V. Sultan & Ors 2nd Appeal No. 18 and Civil Revn. No. 113 cf 2011 D/- 17-2-1955. AIR 1955 J&K 23 (H.C.) D.B.

Adoption — Among Mohammadans — Custom.

Held that if the declaration of adoption in the deed by its own force could confer upon the appellant the status of an adopted son, the mere fact that appellant has set up a different adoption which he failed to prove, would not take away from him the status which arose under the deed and would not disentitle him to claim a relief on the basis ot the deed.

Khalil Bhat & Ors V. Shah Bibi & Anr, Civil Appeal No. 3 of 1349, 8 J & K LR 41 (Board of Judicial Advisors)

Advice of the Board - Whether puts an end to controversy even though accepted by His Highness later.

Held that 'hearing' of the petition is concluded when the Board pronounced their opinion and tender their advice to His Highness. For all practical purposes the controversy is put an end to by the advice of the Board.

Kh. Abdul Aziz Mantoo.....Petitioner Versus Dr Shivji ..... Opposite Party, Misc. Application No. 1 Of 1946, 6 J&K LR Page 146(Board of Judicial Adisors)

Agreement that suit regarding disputes should be instituted in one only out of two competent courts having territorial jurisdiction is a valid agreement.

An agreement between the parties to a contract to the effect that the concerning disputes arising between them on the basis of that contract should be instituted in one only out of two competent Courts having territorial jurisdiction over the subject matter is valid and enforceable and is not void under S. 28. One H of Jammu placed an order with the firm at Bombay for supply of ten boxes of beer and signed the order form in which there was a clause "we agree to the conditions printed on reverse". Condition No. 5 at the back of this document was "all disputes to be settled in Bombay Courts." The order was placed with the firm at Bombay and Rs. 200/- were advanced to the firm. The firm did not supply the goods in time and there was a breach of the contract on their part and hence plaintiffs filed a suit for the recovery of the amount advanced in the Court at Jammu.

Held that Jammu Court had no jurisdiction to try the suit. AIR 1946 Lah 57 (FB), Rel. on. Anno. AIR Man ; Contract Act, S. 28 N. 2. AIR Com ; Civil P. C ; S. 9.N. 5 Pt : 7 ; 1953 Mulla S. 21, P. 129 N. "Waiver ..... jurisdiction" (1 Pt. extra in AIR Com.)

Cases Referred :

AIR 1946 Lah 57 : ILR (1945) Lah 281 (FB)

T. Motandas & Co. V. L. Hakumat Rai and another. Civil Revn. No. 77 of 2009 D/- 28th Phagan 2009. AIR 1955 J&K 26 (H.C.) D.B.

Agriculturists' Relief Act (I of 1983) — Suit for recovery of a sum of money for principal and interest due on a promissory note — Admissibility of fresh evidence in revision—Finding of fact based

on such evidence qustioned—Setting aside of the adverse remarks made in regard to the accounts and other promissory notes received in such evidence.

Held that it is not apparent from the record whether the fresh evidence was received against the consent of the plaintiff and it is not possible to hold that the discretion to admit fresh evidence was arbitrarily or perversely exercised or that the evidence thus received was legally inadmissible. After all the suit has been tried under the provisions of Agriculturists' Relief Act and is not subject to any appeal under law and no question of any general or public importance is involved in the case. The Board, therefore, donot consider this a fit case in which controversy should be treated at large and as not concluded by the findings of the High Court and the evidence of the parties should be reviewed afresh before the Board. For like reasons effect also cannot be given to the second contention of the plaintiff with regard to the remarks made by the High Court which must be taken as limited to the case before it and not applicable to other promissory notes which are not involved in the present suit or to his accounts which were not in issue in the present case.

Sardar Sohan Singh V. Sahiboo & Ors. Civil Appeal No. 5 of 1906 6 J & K LR 83. (Board of Judicial Advisors).

Agriculturists' Releif Act (I of 1983)—Section 3 – Suit against the legal representatives of the executant of apronote alleged to be lost—Plaintiff made a report to the Police regarding the loss of the pronote—Accounts not taken under the provisions of the Act.

Held that even if the pronote had been in existence the suit being against the legal representatives of the executants and under the Agriculturists' Relief Act, it entailed upon the Court the duty to go behind the pronote and do accounting in terms of that Act to find out whether the money was really due. The making of a report to the Police that a certain document is lost is itself a matter of no consequence. If this practice is encouraged important question relating to the genuineness of the documents and the period of limitation etc; would be easily circumvented by unscrupulous money-lenders and the whole object of the Agriculturists' Relief Act will be frustrated.

Sakhi Mohd V. Mohan Lal. Civil Revision (ARA) No. 122 of 2003 7 J&K LR 40 (H. C.) Single Bench.

Ailan of 1999 — Conferment of Proprietary rights on Assamis - Property in the hands of the appellants ancestor heritable — Promulgation of Ailan of 1999 — Whether property in the hands of the ancestor a self-acquired property and liable to be disposed of by will in 1993 and whether before the promulgation of Ailan of 1996 succession to the property governed by Hindu Law or by Statute.

Held that the land which was disposed of by the will had been an ancestral land of the family. It came down to the ancestor of the appellants from his father and as both of his sons were born long before the promulgation of the Ailan of 1990 and the will of 1993 they became entitled on their birth to an interest in the said property. It is, therefore, obvious that if Hindu Law governs the case, the property in the hands of the ancestor would be ancestral property held by him in coparcenary with his two sons which he would have no power to dispose of by will and any will made by him qua that property would be wholly inoperative.

Held further that by the Ailan of 1999 proprietary rights were no doubt conferred for the first time upon the assamis. And one effect of the conferment of the proprietary rights was that it enlarged the quantum of interest which the assamis previously held on their land. But this Ailan in no way abrogated the personal law of the assamis nor did it take away in any way the vested rights which the coparceners of a recorded assami possessed in the land held by the assami nor did it free the recorded assami from the restriction which his personal law imposed upon him in relation to property held by him.

Balwant Singh V. Onkar Singh. Civil Appeal No. 13 Of 1949. 8 J&K LR 52 (Board of Judicial Advisors)

Ailan of His Highness — Urdu and English versions — In Urdu version the word 'Lavald' used, while in English version the equivalent used 'without heirs' — Intention underlying the Ailan.

Held that the word 'Lavald' has been used loosely in Urdu version of the Ailan and the equivalent of this word (issueless) has not been used in the English version. The expression 'without heirs' used in the English version is undoubtedly more in accord with the intention underlying the Ailan that where under the law of inheritance a case of escheat arises His Highness will forego the right thus accuring to him in favour of the entire body of co-sharers. The Ailan was an act of grace to commemorate the happy occasion of his Coronation and it could not have been the intention of His Highness to deprive any one who, but for the Ailan would have been entitled to inherit.

Rassia and Others Versus Pt. Lachmi Dass and Others. Civil Appeal No. II Of 1948. 9 J&K L R 169 (Board).

Alibi—Defence of — Not proved — Whether prosecution case must necessarily be accepted.

In a criminal case the standard of proof is not the same as in a civil case. If there is doubt, the benefit must go to the accused. The burden of proof is always on the prosecution to prove beyond doubt that the accused is guilty. If the defence is a counter version, for instance, a plea of alibi and if that version is not proved, it does not necessarily follow that the prosecution case must be accepted. If there is some evidence in support of the defence version which throws some doubt on the prosecution version, conviction cannot be justified.

Yaseen (Appellent) V. State. Cr. first appeal No. 27 of 2003, 6 J&K LR 6. (H. C.) D. B.

Alienation of Land Act—(V of 1995)—Suit for declaration that plaintiffs belong to the Jat caste—Caste entered in the revenue papers as Kanjar—Kanjar caste not included in the list of agricultural classes framed under section 6 — Effect of entries in revenue papers.

The Board considers that the importance of the entries in the revenue papers consists in the fact that they were made at a time when no dispute as to the caste of the plaintiffs existed, and in view of the entries in two sets of revenue papers within twenty years of each other a very heavy onus lay on the plaintiff-respondents to prove that the entries were incorrect, and that they were able to discharge. It is conceivable that those who were originally Kanjars and whose paternity could be accepted as Jats by the Jat community and may indeed be absorbed into that community. It is possible that in a case of such a character the entry of Kanjar against a man's name will no longer be taken to bar his claim to being regarded as a Jat

agriculturist. The Board, however, consider that on the record of this case such a question does not arise and such a conclusion would not be justified.

State (Defdt. Appellant) V. Ramzan & Feroz (Plantiff - Respondents) Civil Appeal No. 13 of 1947 — 6 J&K LR 126 (Board of Judicial Advisors).

Alienation of Land Act (V of 1995 — Section 6 — List of agricultural classes in the Jammu Province—Items Nos. (1) and (18) in the agricultural classes for the District of Mirpur — Whether a Kashmiri described as such in the revenue records is excluded from the operation of those items.

The word 'Kashmiri' literally means of Kashmir or belonging to Kashmir. It does not specify any caste or religion and it primarily refers to the home or original home of a person. Items Nos. (1) and (18) of the list for Mirpur District have no reference to the original home to the class specified in these items.

Fazal Dad (Pltf. Applt). Versus Revenue Commr. (Defdt. Respdt) Civil Appeal No. 14 Of 1947—7 J&K LR 150 (Board)

Alienation of Land Act (V of 1995)—Section 5(2)(ii)(c)—Alienation of land not exceeding 4 kanals by a non - agriculturist — Difference in this respect between old and new Acts.

Under the alienation of Land Act, 1990, alienation of land not exceeding 4 kanals by a non-agriculturist for residential purposes was permitted and such a person could purchase more than 4 kanals by successive alienations. This is not possible under the Alienation of Land Act, 1995, which allows such acquisition only once.

S. Shamsher Singh (Pltf. Applt) Versus Shiv Ram & Ors (Deft. Respdts) Civil 2nd Appeal No. 5 of 2003, 7 J&K LR I (H. C.) D. B.

Allottee—position of under J&K State Evacuees (Administration of Property) Act (2006)—not a lessee but merely a licensee.

The position of an allottee under J & K State Evacuees' (Administration of Property) Act (2006) is quite different to that of the lessee. An allottee is merely a licensee, 1951 Punj 327 and 1954 Punj 165 Rel. on.

Gian Kaur & Ors V. P. R. O. & anr. Writ Petns. Nos. 255, 289 and 304 of 2011 D/- 9-3-1956. AIR 1956 J&K 33 (H.C.)F.B.

Amendment—Clause 13 of the House Rent Control Order, 2000 amended after filing of the suit and drawing up of the issues but before the decree—Amendment not retrospective:

Held that suits which are declaratory or explanatory or procedural may be construed to be retrospective, but ordinarily no other statute is to be construed to be retrospective unless it expressly or impliedly says so. On the contrary a Statute which affects vested rights is ordinarily presumed not to be retrospective. It may further be stated that the House Rent Control Order by its very nature cannot be retrospective unless it is expressly so stated.

Th. Harison Club V, MR Krishen Gopal, Civil IInd Appeal No. 157 Of 2003, 7 J&K LR 113 (H.C.) D.B.

Appeal—presentation of memorandum of appeal—must be presented by an authorized person or else to be rejected.

It is true that an appeal must be presented by an authorized person, and if it is presented by a person who is not authorized to do so, it shall be rejected. But, where an appeal is presented by an authorised person, but in a wrong court and that court instead of returning the appeal to the appeallant, itself sends it to the proper court which accepts the presentation, the appellant should

not be made to suffer for the mistakes of the Court on the principle 'actus curiae neminem gravabit', and the appeal should not be dismissed.

Gangu & Ors. V. Lassa Zargar & Ors. Rev. 1st appeal No. 23 of 2008 D/- 5-4-54. AIR 1954 J&K 44 (H. C.) S. B.

Amendment—Suit for permanent injunction — Amendment seeking new relief of possession — Whether amendment can be allowed — Order 6 Rule 17, C. P. C.

The main object of allowing amendments is to get at the rights of the parties and to avoid multiplicity of suits. But there is one condition, and that is that it should be possible to settle the dispute in the suit already instituted without unfairness or injustice to the opposite party.

In a suit for permanent injection to restrain the defendants from interfering in the plaintiff's possession an application seeking permission to amend the plaint was made stating that the defendants took forcible possession of the land in dispute during the pendency of the suit and the plaintiff be permitted to seek further relief of possession. The defendants resisted it on the ground that it would change the nature of the suit :

Held, that if the amendment was not allowed, it would mean that the plaintiff should bring another suit. Such a state of affairs could be easily avoided by an amendment. It should therefore be allowed. AIR 1942 Sind 4 Dissented from Chitaley's Civil P. C. pp. 1754-55 and other case law referred. Anno: Civil P. C. O. 6, R 17 N. 1,2,9.

Cases referred :- *Mst. Dedri V. Mst Khatji & anr, Civil Revn. No. 29 of 2011 D/- 23-8-1954. AIR 1954 J & K 63 (H. C.) S. B.*
AIR 1927 Oudh 513 ; 105 Ind Cas 784 ; 1250 Pepsu 21, 1935 Mad 286 ; 155 Ind Cas 1016 ; 1942 Sind 4 ; 198 Ind Cas 69

Appeal to His Highness' Act (XVI of 1996) Section 2(a) — Appeal from final order — "final order" explained — Whether an order of the High Court, setting aside a compromise recorded by the lower Court, is a 'final order' or not.

Held that an order of the High Court, setting aside a compromise recorded by a lower Court, is not a final order so as to be open to appeal to His Highness under Section 2(a) of the Appeals to His Highness' Act, 1996.

Th. Bhikam Singh V. Surjan Singh 4 J&K LR 41 followed : 60 Indian Appeals 76 referred to.

Sheikh Ghulam Ghaus V/s S. Gazanfar Ali Shah & anr. Civil Appeal No. 2 of 1947—6 J&K LR 55 (Board of Judicial Advisors).

Appeals to His Highness' Act (XVI of 1996) Section 5 - Enquiry about the question of valuation.

According to the value stated in the plaint for purposes of jurisdiction it was less than Rs. 2, 500/-. The petitioner, however, urged before the High Court that the actual market value of the property in dispute exceeded Rs. 2, 500/-. In these circumstances the High Court ought to have made enquiry into the correctness or otherwise of his allegation. This has been clearly laid down in section 5 of the Appeals to His Highness' Act.

Mst Madrialias Shobawati.....Petitioner V/s Ram Chand Baya (Opposite Party) Application for Special leave to appeal No. 54 of 1946. 6 J&K LR 124.

Appeal to His Highness' Act (XVI of 1996) section-2 cases in which appeal lies. Application for special leave to appeal — Jurisdiction—Suit by plaintiff on a claim for declaration valued

at Rs. 3,000 and for pre-emption valued at Rs. 700—First claim disallowed by the Court of first instance — Question of jurisdiction not raised before the District Judge and over - ruled when raised in the High Court — Point of jurisdiction made ground for special leave to appeal.

Held that the ground on which leave to appeal is sought has no substance. The suit was of a composite nature involving two separate and distinct claims; firstly for a declaration valued at Rs. 3,000 and to this extent the appeal would lie directly to the High Court but this claim having been disallowed by the first Court the only claim which remained and which was in question in the Court of District Judge and the High Court was for pre-emption valued at Rs. 700. In this view there can be no doubt that the District Judge had jurisdiction so far as the suit related to pre-emption. The same is the case as regards the second appeal to the High Court *Ali But V. Hamza Raina & Ors. Civil Appln. For Special Leave To Appeal No. 4 of 1948 (Board of Judicial Advisers) 8 J & K. LR 30.*

Appeal — Order directing prosecution under Section 476—Limitation for filing appeal — Time runs from the date when the complaint is actually made—Articles 154 and 155 Limitation Act (IX of 1995).

Held that where an application under section 476 asking the Court to make a complaint is refused, time runs from the date of the order of refusal. But this is not so where an order is made directing a complaint to be filed. There time runs not from the date of the order, but from the date when the complaint is actuallay made. This follows the wording of section 476 to 476—B. The latter section gives the right of appeal when the complaint "has been made", AIR 1929 Cal. 521 referred to.
Lakhmi Nath & Anr V. State; Lakhmi Nath V. State; Janki Nath V. State. Cr. Appeals No. 40 of 2003 and Nos. 6 & 7 of 2004. 7 J & K LR 94 (H. C.) D. B.

Appeal—Section 476 Cr. P. C. — Appeal from the order of Single Judge competent to the Division Bench.

Held that the expression "subordinate" is not to be understood in the sense in which it is used under section 115 of the Civil Procedure Code or in the case of a Court under the Superintendence of a High Court. Section 476-B specially provides that the word "subordinate" is to be read as "within the meaning of section 195 sub-section (3)" This section has been amended, among other things, by the insertion of the words "appealable decrees". The result is that a single judge of the High Court is subordinate to a Division Bench on the ground that appeals in appealable decrees lie from the single judge to the Division Bench.
Lakhmi Nath & Anr V. State ; Lakhmi Nath V. State ; Janki Nath V. State. CR Appeals No.40 Of 2003& Nos. 6 & 7 of 2004. 7 J&K LR 95 (H.C.)D.B.

Appeal — From appellate decree — Copy of the judgment of the trial court filed after the period of limitation — Appeal held to be time barred.

Held that the argument that it is not essential to attach a copy of the trial Court's judgment cannot be accepted in view of the express provisions of law under Order 42 Rule I which is different from the law in British India. It is also well known that the practice is to attach a copy of the judgment of the trial Court. *Qazi Khalil-ul-Rehman V. Atma Ram. Ciuil IInd Appeal No. I of*

2003. 7 J&K LR 101 (H. C.) D. B.

Appeal—Forum of—In suits for pre-emption—Determined not by valuation laid in the plaint but as determined by judicial decision.

In regard to suits for pre-emptlon in relation to houses, the forum of the Court of appeal is determined not by valuation laid in the plaint but by the valuation determined by the judicial decision.

Jamal Sofi & Ors. V. Mohd Sidiq & Ors. Civil appeal No.4 of 1952 D/-10-9-1952. AIR 1953 J&K 47 (Board of Judicial Advisers)

Appeal—Suit for accounts — Forum of Appeal — Suits Valuation Act (1887) S. 8.

For determing the appellate forum in account suits, wherein the plainfiff has the right to value his suit tentatively, the appellate forum will be determined not bv the amount found due to the plaintiff or the defendant, but by the value which the plaintiff puts on the subject-matter of his suit in the plaint. Case law discussed. Anno: S V. Act,S.8 N. 33.

Ganga Ram V. L.Madan Lal Kapur. Rev. First Appeal No. 28 of 2008 D/- 25-9-1952. AIR 1953 J&K 13 (H.C.) D.B.

Appeal —Suit decreed in favour of a party but adverse finding against him on a point not necessary to be decided for the passing of the decree — Successful party not competent to appeal

Where a suit is decreed in favour of a party but there is an adverse finding against him on one point which is not at all necessary for passing the decree, the finding cannot operate as res judicata as between the parties and as such the successful party is not competent to appeal against that finding. 3 J & K LR 186, Rel. on ; Chitaley's Civil P. C. Ref. to.

Mohd Mir V. Gh. Mohi-ud-din & Ors. 2nd appeal No. 35 of 2006 D/- 1 Bhadon 2007. AIR 1954 J & K 32 (H. C.) S. B.

Appeal—S. 5 (3). J&K Agriculturists Relief Act—Whether appeal lies from an order passed by the Court in a suit under S. 5(3) except against the order specified in clause (h) of S. 104, C. P. C. — Order recording a compromise or an agreement or satisfaction under 0. 23, R. 3 — Whether appealable — Remedy of revision.

There is an obvious distinction between an order recording an agreement, a compromise or satisfaction and the final decree that should be made in accordance therewith.

An order under Rule 3 of Order 23 recording or refusing to record an agreement, a compromise or satisfaction is appealable under 0. 43, R. 1 (m) irrespective of the consideration whether the decree that followed it was a consent decree or not. The restriction that consent of the parties takes away the right of appeal does not attach to the order.

But under S. 5(3), J. and K. Agriculturists' Relief Act no appeal lies from any order passed the Court in any such suit with the exception of the order specified in Cl. (h) of S. 104, Civil P. C., and, therefore, an order recording an agreement,a compromise or satisfaction under O. 23.R.3, is not appealable and the only remedy by which a glaring injustice arising from such an order can be got removed, is to apply in revision.

Cases referred. AIR 1933 Bom 205 57 Bom 206; AIR 1944 Bom 239 (2) : ILR 1944 Bom 405 ; AIR 1936 Mad 385 : 163 Ind Cas 161 ; AIR 1934 Cal 846 : 61 Cal 910.

J. L. Raina & Ors. V. P. L. Raina & Ors. Civil Misc. Appeal No.

6 Of 2010 D/- 11-12-53. AIR 1954 J&K 55 (H. C.) D. B.

Appeal — Appellate Court—jurisdiction of to decide the category of suit and hold that it has no jurisdiction to entertain appeal and return the appeal for presentation to the proper Court.

Where in the trial Court objection was raised as to the insufficiency of court-fee, but the objection was overruled and the suit was dismissed on merits, and on appeal the same objection as to insufficiency of court-fee was raised and the appellate Court decided that the suit fell under S. 7 (x) (a) and not under S, 8 (v) (b) and further held that as under S. 8, Suit Valuation Act, the value determinable for the computation of court-fees and the value for purposes of jurisdiction was the same, the value for purposes of jurisdiction in the suit was Rs. 600/- and as that Court could not hear appeals from the Court of a Munsif & only where the value of original suit, in which a decree or order was made, did not exceed Rs. 500/- it had no jurisdiction to try the appeal and, therefore, returned it for presentation to the competent Court ;

Held, that the appellate Court was right in deciding whether it had jurisdiction to hear the appeal and in doing so it had nectssarily to decide valuation both for purposes of court-fee and jurisdiction, and that therefore its order returning the appeal for presentation to proper Court was proper. AIR 1928 Lah 635 : 1925 Pat 488, Relied on. Anno. Court-fees Act, S, 12 N. 1, 7 : Suits Valuation Act, S. 8, N. 1, 2.

Cases referred : AIR 1939 All 552 : ILR 1939 All 557 ; AIR 1923 Cal 405 : 71 Ind Cas 1014 ; AIR 1951 Mad 886 (2) : 64 Mad LW 462 : AIR1952 Pat 290 ; 1953 J&K 13 : 11 J&K LR 107 ; 1925 Pat 488 : 90 Ind Cas 321 ; AIR 1928 Lah 635 : 111 Ind Cas 72.

Lassi Ganai, V. Mohd Allayi & Ors. Civil Revn. No. 27 of 2008 D/- 24-6-1954. AIR 1954 J&K 57 (H. C.) D. B.

Appellate Court — Porwer to decide the question under what particular provision of the Court-fees Act a suit falls.

The question under what category a suit or appeal falls for purposes of court-fees does not come within the purview of S. 12 But the non-applicability of this section does not mean that an appellate Court can not decide the question under what particular provision of the Court-fees Act suit falls and cannot demand additional court-fees if, as a result of the change of the category of a suit, additional fee becomes necessary. Anno. Court-fees Act, S. 12 N. 1.

Lassi Ganai V. Mohd Allayi & Ors. Civil Revn. No. 27 of 2008 D/- 24-6-54. AIR 1954 J&K 57 (H. C.) D. B.

Approver—Merely stating what he heard from another witness — Did not make any incriminating statement but endeavoured to exculpate himself by minimising the part played by him — Evidentilary Value—Desirability on the part of police to introduce such approvers.

Held that the evidence of such an approver is of no value whatever.

The Board have had cases constantly coming up before them in which the police showed too pronounced a tendency to simplify matters by introducing an approver. In the majority of such cases the approver's evidence is unreliable and the High Court naturally approaches his evidence with extreme caution. The police will be well advised to refrain from adopting such short cuts and to confine themselves to such evidence as may be likely to appeal to a Court of law.

Qadir Gujar V. State. Cr Appeal No. 2 of 1947 — 6 J&K LR 87 (Board of Judicial Adisors)

Approver — Evidence of approver not to be relied upon unless corroborated in material particulars. Accomplice — Who is an accomplice — Value of the evidence of an accomplice.

The rule of guidance in the case of evidence of an approver is to be found in illustration (b) of section 114 and 133 of the Evidence Act. Both the sections (section 133 and section 114 illustrated) are parts of one subject and should always be considered together. The rule of law says that an accomplice is competent to give evidence and the rule of practice says that it is almost always unsafe to convict upon his testimony alone. An accomplice is unworthy of credit against an accused person unless he is corroborated in material particulars. Corroboration falls under two heads (I) general corroboration (2) special corroboration connecting each of the accused with the offence.

The test that can be laid down in order to see as to whether a particular witness is an accomplice or not, is as to whether he can be jointly indicted with the other accused in a particular case. The mere fact that the police has not secured pardon for him would not in any way improve his position. The statement of an approver must be corroborated by independent evidence i. e. by evidence of a person other than that of an accomplice. It should not be lost sight of that tainted evidence cannot be made better by being doubled in quantity. Therefore, the evidence of one accomplice cannot be corroborated by that of another accomplice.

Ghulam Nabi Bazaz & Others Versus State. Criminal Revision No 28 Of 2006. 9 J&K L. R. 18 (H. C.) Single Bench.

Approver — Evidentiary value of — Exculpatory statement.

Held that though an accomplice is not an incompetent witness, the evidence of such a man who at no stage assings to himself a conspicuous part in the plotting or execution of the nefarious crime stands in greater need of corroboration than that of an accomplice who admits to have taken an appreciable part in the preparation of the deed.

Atta Mohammad Versus State. State Versus Ghulam Mohd. State Versus Ghulam Mohd And Others. Criminal First Appeal No. 55 Of 2006. Criminal Reference No. 10 Of 2006. Criminal Revision No. 58 Of 2007. 9 J&K L.R. 137 (H. C) D. B.

Approver — Statement of — Not implicating himself — Necessity of corroboration.

Though an accomplice is not an incompetent witness it is unsafe to base a conviction on his statement unless it is corroborated in material particulars. Where the apprnver states himself to be a mere bystander and throws the whole guilt on the other accused, his evidence stands in a greater need of corroboration than that of an accomplice who admits to have taken an appreciable part in the perparation of the offence.

Atta Mohd V. State. Cr : 1st appeal No. 55 of 2006 D/- 15 Katik 2007 AIR 1952 J&K 26 (H. C.) D. B.

Approver — Necessity of corroboration of his evidence — Nature of corrobaratian required.

A conviction based upon the uncorroborated testimony of an accomplice is not illegal, though it is highly dangerous to base a conviction upon his uncorroborated evidence. It is a wholesome rule of practice that an approver must be corroborated before he

is treated as worthy of credit. The question of corroboration however, is not an easy one and in every case the Court has got to see that the corroboration forthcoming is not only in general terms but must specifically connect each accused with the actual commission of the offence. AIR 1932 Lah. 204 Foll. Case Law Ref.
Gh. Nabi & Ors. V. St te. Cr. Revn. No. 28 of 2006 D/- 9 Maghar 2006. AIR 1953 J&K 4 (H. C.) S B.

Approver — Corroboration of his statement — Not safe to act unless corroborated in material particulars by independent evidence — Tainted evidence cannot corroborate. Accomplice evidence subsequently retracted — Greater scrutiny and corroboration required

It is not safe to act upon the approver's statement unless it is corroborated in material particulars and the corroboration should consist of independent evidence. One piece of tainted evidence cannot corroborate another piece of such evidence. While it is true of ordinary accomplice evidence, greater scrutiny and greater corroboration is required in the case of an accomplice evidence which has been subsequently retracted. It is the evidence of a man who is not only immoral in so far as he is a participator in the crime and betrayer of his associate but who is also according to his own showing a patent perjurer.
Mst. Arandttai V. State, Cr. first appeal No. 4 of 2011 D/- 22-2-1955 AIR 1955 J&K 13 (H. C.) D. B.

Arms Act (1878), S. 19 (e) and (f) — "Goes armed"—Meaning of.

A person carrying a revolver with four live cartridges in a bag "goes armed" within the meaning of S.19(e), and is not merely in possession of a weapon. AIR 1925 Mad 585(1), Distinguished: 1941 Pat.284, Rel on.
Dina Nath V. State. Cr. Revn. No. 69 of 2010 D/- 14-4-1954. AIR 1954 J&K 41 (H. C.) S. B.

Assami Rights—Fully heritable though not transferable—Revenue circular.

Revenue Circular Vol. I p. 215 declares assami right to be fully heritable though not transferable and subject to the ordinary rules of inheritance according to Hindu Law. This is expressly provided in the Land Revenue Regulation of 1980 section 130.
Pt. Janki Nath Appl. V. Sati Mali & Ors. Civil Appeal No. 24 Of 1947, 6 J&K LR 138 (Board of Judicial Advisers).

Attempt—S. 511 Cr. P. C.—Intention — Preparation and attempt — J & K Egress and Internal Movement (Control) Ordinance (2005)—Attempt to commit offence — What is — Accused going towards border with intention to cross over to Pskistan—Arrest at 160 yards from border—Offence not completed —

Before the commission of an offence, an accused has got to go through three preliminary stages; first that of intention to commit the offence, secondly, preparation to commit and thirdly, attempt to commit it. Mere intention to commit an offence is not punishable. Nor is preparation to commit it. It is only when the preparation merges itself in attempt that the act becomes punishable by law.

Where a woman was going towards the border with the intention to cross over to Pakistan but was arrested when she had 160 yards more to cover and tried for an offence under S. 3 of the Ordinance.

Held that (1) the Section was designed to deal with the action of those persons who make an attempt to cross the border without permis-

sion. There could be no presumption that anybody who moved towards the border wanted to cross-over. The offence would commence only when a step was taken towards crossing the border.

(2) that her action amounted to a mere preparation and not an attempt and as before actually reaching the border line she might have changed her mind and come back, benefit of doubt should be given to her. 8 Mad. 5 and AIR 1932 Mad. 507, Rel. on.

Mt. Noor Bibi V. State. Cr. Revn. No. 74 of 2007, D/- 10 Assuj 2007. AIR 1952 J&K 55 (H. C.) S. B.

Attestation — Deed of gift — Execution admitted by executant —Deed registered—Whether attestation of the deed necessary— Evidence Act (XVI of 1977)—Section 68 and 69.

Section 68 of the Evidence Act deals with the mode of proof of the deed of gift which is required by law to be attested and in order to make a deed of gift admissible in evidence as a deed of gift it is enough to comply with the provisions of section 68 or section 69, as the case may be, of the Evidence Act. But if the question be whether the document did create a gift or not it must be proved that the requirement of law as contained in section 123 and 59 of the Transfer of Property Act have been fully complied with. If the executant does not specifically deny the execution of a registered document then in that case the attesting witness need not be produced in proof of that document. That is what the proviso to section 68 of the Evidence Act lays down, but a party who is affected by the document would not be bound by the admission made by the executant. In that case the registered document will have to be proved by the production of the attesting witness and if the Validity of the document is also challenged in the sense that the document did not affect a gift in law then it must be proved by the donee that the gift deed was attested by at least two witnesses.

AIR 1932 All. 527 & 1923 Pat 436 referred to.

Sh. Raghunath Dev. V. Samad Gashru & Ors. Civil First Appeal No. 28 of 2005, 8 J&K LR 109.

Bail — Accused released on bail by A. D. M. — Later on case transferred to another magistrate who ordered rearrest on the ground of tampering with evidence — Order of the magistrate without jurisdiction — Cannot be upheld in exercise of inharent powers.

Held that if the prosecution is of the opinion that the accused are misbehaving and mis-using thier liberty the remedy available is to move the High Court or the Court of Session for the cancellation of the bail of the accused.

As regards the Courts below the Sessions Court, this power of cancelling the bail and ordering re-arrest can be exercised only by the Court which has ordered the release of the accused on bail. The word 'itself' in subsection (5) of section 497 means a Magistrate who has initially ordered the release of the accused on bail.

Inherent powers of a Court cannot be invoked on a point where the Code has made an express provision. Moreover, there should be no resort to inherent power when there are other remedies available.

Hardatt Raina V. Tej Ram Cr. Misc. Appeal No. 90 Of 2005, 7 J&K LR 56 (H. C.) Single Bench.

Board of Judicial Advisors — Special Leave to Appeal — Application to grant leave in two interconnected matters — In one matter application for leave to appeal refused by High Court and in the other no such application made to High Court—One spplication for special leave to appeal in both matters — Application made very late.

Held that the applicant has given a reasonable explanation for the delay in making his application in one case and for not making a petition to High Court in the other case. Ordinarily it is essential for the applicant to move the High Court first before coming to the Board. But as the two matters are inter-connected the Board is of opinion that in the special circumstances of the case both matters should be allowed to be agitated.

Raja Sahib Of Poonch, Petitioner Versus Kirpa Ram — Opposite Party. Application For Special Leave to Appeal No. 49 Of 1949, 6 J&K LR 143. (Board of Judicial Advisers).

Board of Judicial Advisors — Decision of, when not binding on a Full Bench of the High Court.

Where a certain point of law is not brought to the notice of the Court in determing the cause, the decision is not a precedent calling for the same decision in a similar case in which the point is brought before the Court.

Hence where the ruling of the Board of Judicial Advisers (Kashmir) has not taken into consideration a certain provision of law, tne ruling is not binding on the High Court of Jammu and Kashmir.

Gh. Rasul V. State Misc. Appln. No. 23 of 1955 D/- 27-9-1955. AIR 1956 J&K 17 (H. C.) F. B.

Burden Of Proof Of Guilt — Benefit of Doubt.

In a Criminal case the standard of proof is not the same as in a civil case. If there is doubt, the benefit must go to the accused. The burden of proof is always on the prosecution to prove beyond doubt that the accused is guilty. If the defence is a counter version, for instance, a plea of alibi and if that version is not proved, it does not necessarily follow that the prosecution case must be accepted. If there is some evidence in support of the defence version which throws some doubt on the prosecution version, conviction cannot be justified.

Yaseen V. State Cr. First Appeal No. 27 Of 2003, 6 J&K LR 2 Vol. 6 (H. C.) D. B.

Burden of proof — Adverse possession — Nature of evidence — Article 144, Limitation Act (1908)

It is a fundamental principle of law that when the question of acquisition of title by adverse possession has to be determined, clear and definite evidence relating to different points of time should be adduced by the person who asserts that his possession has been adverse for a statutory period and he has thus acquired title by prescription.

Garibu & Ors. V. Bh. Lakhshmi Narain Civil 2nd appeal No. 45 of 2006 — D/- 14-1-1952. AIR 1952 J&K 24 (H. C.) D. B.

Burden of proof—Murder—Duty of prosecution—Evidence Act—S.103.

The burden of establishing guilt of the sccused is throughout on the prosecution and the prosecution must prove every link in the chain of evidence against the accused from the beginning to the end. When two persons are seen together and shortly afterwards one of them is found to have been murdered it cannot be

inferred positively that his companion is responsible for the murder of the deceased unless there are other circumstances to support that inference. No doubt the circumstance that the deceased was last seen in the company of the accused is there but mere circumstances of suspicion without more conclusive evidence are not sufficient to justify conviction of the accused.
Samad Malik V. State. Cr Ist appeal No.8 of 2009 D/- 9 Assuj 2009. AIR 1953 J&K 2(H.C.)D.B.

Burden of Proof — Criminal trial — Whether weighing of evidence in golden scales.

Though the evidence, both for the prosecution and for the defence, has, at some stage of the case, to be weighed, in criminal cases the evidence has not to be weighed in golden scales, and there must be great preponderance of weight on the side of the prosecution before the accused can be found guilty. AIR 1944 F. C. 66, (FB) Rel. on.
Badri Nath V. State. Cr. appeal No. 1 of 1952 D/ 18-8-1952. AIR 1953 J&K 41 (Board of Judicial Advisers)

Burden of proof — J & K Agriculturists' Releif Act (I of 1938) — S. 2

What a person who claims the benefit of the Act on the ground that he is an agriculturist has to prove specifically is that he was wholly or principally dependent for his maintenance upon agricultural,horticultural or pastoral pursuits. Claimant not doing so but admitting that long prior to suit he had mortgaged his land and that on date of suit he was in receipt of pension only and not any income from agricultural sources—Held he was not an agriculturist.
Niranjan Nath V. Kailash Kaul & anr. Civil original suit No. 14 of 2008 D/- 28- 5- 1953. AIR 1954 J&K 6 (H. C.) S. B.

Cancellation of sale deed — Demand for cancellation can be made by transferor or transferee — Other parties affected can demand only declaration.

The matter of cancellation of the document is one between the transferor and the transferee. The other parties affected by the sale deed can at best demand only a declaration that deed will not affect their rights.
Chand & Ors. V. Bhagat Ram & Ors. Civil 2nd appeal No. 265 of 2002,6 J&K LR page 40 (H. C.) Single Bench.

Cheating — Proof of intention pre-requisite — If criminal intention not established no offence committed — Breach of contract only.

Where a complaint of an offence of cheating is made on the ground that the accused has entered into a contract with the latter and that he had not commenced work in spite of complainant making two payments as agreed, the complainat has to establish a preconceived intention on the part of the accused of not carrying out the terms of the agreement. Such an intention cannot be presumed from the mere receipt of money and not working subsequently according to the terms of the agreement. Mere receipt of money would not be cheating unless it is shown that it was received with the preconceived intention of denying it later on. If the intention is changed subsequently it would not be cheating. 159 Ind. Cas. 167 (1) (Pat) and AIR 1923 Lah 621, Rel on.

The whole transaction may amount to a breach of contract, might involve a breach of faith, a betrayal of confidence, and might arouse moral indignation. But that would not convert it into a criminal offence. AIR 1938 Mad 129 Rel on.

Anno. 1. P. C; S. 420 N. 4, 11.

Devia Ram & anr. V. L. Ram Chand Appln. No. 105 of 2009 D/- 25- 2- 1953. AIR 1953 J&K 22 (H. C.) S. B.

Citizenship of India for State Subjects — Constitution (Application to Jammu and Kashmir) Order 1954.

But whatever doubt there may have been as regards the position of the State subjects outside the State in India at that time, it has become absciutely clear that since the promulgation of the Constitution (Application to Jammu & Kashmir) Order, 1254 the subjects of this State became full citizens of India with effect from 26-4-1950 (vide paragraph (3) of the said order).

M. L. Saraf V. Firm Bhagwan Dass Gurdyal. First Appeal No. 32 of 2009 D/- 19-1-1955. AIR 1955 J&K 5 (H. C.) F. B.

Civil Procedure Code (Act X of 1977) — Order XXI (A), Rules 7 and 8 — Of insolvent judgment - debtors — Difference between British Indian Law and the State Law.

When a judgment - debtor is arrested or imprisoned in execution of a decree for money, or against his property an order of attachment has been made in execution of such decree he mav apply to be declared an insolvent under the State Law. If the Court is satisfied that the provisions of rule 8 are in his favour, it may declare him to be an insolvent.

The provisions for insolvency proceedings in the State are embodied in Order XXI (A) of the code of civil procedura and they are in some respect different from those of the provincial Insolvency Act in British India. In particular there is no provision in the State law unlike the British India law that the amount of the debts should be Rs. 500; nor that the debter shall not be entitled to present an insolvency petition unless he is unable to pay his debts.

A. I. R. 1928 Lahore 202 distinguished. IJ and K. L. R. 126 referred to.

Raj Mohammad V. Mehta Kanshi Ram & Ors. Civil Misc. 1st Appeal No. 36 of 2002, 6 J&K LR page 74 (H.C.) D. B.

Civil Procedure Code (Act X of 1977) — Section 60, provise clause (c) — Execution proceedings — Father a non-agriculturist contracts a debt — Father dies before or after the decree is passed — Son who is an agriculturist inherits a residential house from his father — Whether the house liable to be attached and sold in execution of the decree against the father or the son.

Held that in Such a case the crucial test is whether on the date of application for execution of decree by attachment of the house it is the residential house of the agribultirist to whom it belongs and against whom the process of execution is applied for. The intention of the Legislature obviously is that every agriculturist whether he is liable in his personal capacity or otherwise should have his residential house secured to him against the processes in execution.

I. L. R. 7 Pombay, P. 530, AIR Allahabad 1928, P. 211; AIR 1932 All. P. 508; AIR 1939 Lahore 556; AIR 1940 Lahore 320 referred to.

Feroz V. S. Jai Singh. Civil Appeal No. 7 of 1947. 6 J&K LR Page 90 (Board of Judicial Aavisers).

Civil Procedure Code (Act X of 1977) — Section 100 — Second appeal — Concurrent finding of fact conclusive.

Courrent finding of the first two courts not being vitiated

by any error of law, is conclusive in second appeal.
Abdul Ghani & Ors. (Pltffs. — Applts) Versus Ch. Ghulam Ahmed & Ors. (Depts. Respdts) Civil Appeal No. 21 Of 1947. 6 J&K LR 160 (Board Of Judicial Advisers)

Civil Procedure Code (Act X of 1977) — O. I. R. 3 — Abatement of appeal arising out of a declaration suit — Impleading each co-sharer in joint land not necessary.

Each appellannt as a joint owner is entitled to seek a declaration that respondents have no interest in the joint land and in order to obtain this declaration it is not necessary for him to implead each co—sharer in the joint land who supports his claim and who also likewise desires a declaration against respondents. If the non—joinder of a co—sharer in such an action in original Court is not fatal to the maintainability of the claim then the non—joinder of a co—sharer in appeal stands on the same footing and does not affect the right of a surviving co—sharer to continue the appeal.
Jamadar Rajwali Khan & Ors. (Pitff: Applts) Versus Ali Khan & Ors. (Defdt — Respdts) Civil Appeal No. 14 of 1945, 6 J&K LR page 166 (Board of Judicial Advisers).

Civil Procedure Code (Act X of 1977) — Order 42 rule I — Appeal from appellate decree — Copy of the judgment of the trial Court filed after the period of limitation without explanation for delay — Apppeal time-barred.

Held that the argument that it is not essential to attach a copy of tha trial Court's j dgment cannot be accepted in view of the express provisions of law under Order 42 Rule I which is different from the law in British India. It is also well known that the practice is to attach a copy of the judgment of the trial Court.
Qazi Khalil-ul-Rehman V. Atma Ram. Civil IInd Appeal No. I of 2003 7 J&K LR 101 (H. C.) D. B.

Civil Procedure Code (Act X of 1977) — Order XXI Rule 92 — Confirmation of sale of immovable property in execution proceedings — Wrong description of Khasra number - No mistake of identity of land - Effect.

Held that where there is no mistake of identity, a mere wrong description is not material.

AIR 1930 Allahabed 556 & AIR 1933 Lah.1031 referred to.
Mehna V. Satar Mohd & Ors. Civil IInd Appeal No. 77 of 2004 7 J&K LR 129 (H. C.) D. B.

Civil Procedure Code (Act X of 1977) — Res-judicata - Suit for possession of land brought in 1992 ended in a compromise decree — A minor being a party in the suit was represented by a next friend — No permission as required by compromise on behalf of the minor — A second suit whether not maintainable.

Held that in these circumstances the compromise decree in the previous suit would not operate as res—judicata so far as the suit of the minor was concerned.
Shah Room Khan V. Mohd Farid Khan. Civil IInd Appeal No. 57 of 2004. 7 J&K LR 154 (H. C.) D. B.

Civil Procedure Code, 1977 — 0. 32 r. 7 — Compromise — Some of the parties to a compromise being minors — Leave of the Court not secured to effect compromise on behalf of minors — Whether the compromise reduced to nullity.

Held that the compromise could not be treated as a nullity or void ab initio. Sub rule 2 of rule 7 of order 32 makes it clear enough that the compromise cannot be avoided by any person other than the minor. Rather it is binding upon every person excepting

the minor. The minor alone can avoid it or he may if he so chooses on attaining majority ratify or affirm it. AIR 24 All.625 referred to.

Sona Wani V. Lassi & Ors. Revenue IInd Appeal No. 3 of 2004, 7 J&K LR 177 (H. C.) Single Bench.

Civil Procedure Code (X of 1977) — Section 100 — Concurrent findings of the Courts below with regard to a question of fact — Second appeal to the High Court — Interference by the High Court.

Held that the jurisdiction of the High Court for interference in a second appeal is limited by section 100 of the Civil Procedure Code. It can interfere with findings on questions of fact only when the Courts below have committed some error of law or procedure and, however, perverse the findidgs of the Courts below may be they are birding upon the High Court unless they are vitiated by any error of misdirection in law. It is therefore, not only proper and desirable but it is necessary that when the High Court interferes with a concurrent finding of the Courts below or with the finding of a lower appellate Court on a question of fact, it should state in its judgment the error of law committed by the Courts below and the reasons for the interference.

Badri Nath V. Basantu & Ors. Civil Appeal No. 9 Of 1947, 7 J&K LR 213 (Board Of Judicial Advisers).

Civil Procedure Code (Act X of 1977) — Section II-Res-Judicata — Issue in former case need not be expressly put or decided in words — Implied adjudication enough.

Held that it is a well established rule of law that for the plea of resjudicata to prevail it is not always necessary that there should have been an express finding on the relevant issue and if the decision in the former suit cannot be accounted for except on the supposition that the issue arising in the subsequent suit was decided the decree will operate as res-judicata on such issue.

51 I. A. page 293 : S. C. 51 Cal. P. 631 and ILR 15 Bombay P. 89 followed.

Ahad Ganai V. Dewan Jewan Nath Madan, Civil Appeal No. 18 Of 1947, 7 J&K LR 218 (Board of Judicial Advisers).

Civil Procedure Code (Act X of 1977) — Order XVII rule 2 and 3, 0, IX r. I3 — Case edjourned to 3rd Chet for the purpose of recording the evidence of the defendant's witnesses — No witness of the defendant nor he himself present on that date — Ex-parte proceeding taken against the defendant and case adjourned to 8th Chet arguments on behalf of the plaintiff heard and ex-parte decree (sought to be set aside) passed on 14th Chet — Whether the order dated 14th Chet 2004 is one under 0. 17 r. 3 C. P. C.

Held that unless and until the facts and circumstances of the case clearly indicate that the order is one under 0. XVII r, 3 it should be treated to have been passed under 0. XVII r. 2. 0. XVII r. 3 would apply only in such cases where a party has failed to produce his evidence or to cause the attendance of his witness or to perform anyother act necessary to the further progress of the suit in spite of time having been granted to him for so doing. If only one of the parties is present and an exparte order is passed then the rule that can correctly be applied is 0. 17 r. 2. As such an application under 0. 9 r. 13 for getting the exparte decree set aside can be put in according to law.

I. L. R. XLI Mad. 286 (F. B.) AIR 1933 Cal. 73 referred to.

Dina Nath V. Bamdev & Ors. Civil Revision No. 32 and 33 of

2005, 7 J&K LR 247 (H. C.) Single Bench.

Civil Procedure Code (Act X of 1977) — O. VI — Pleadings.

The Board of Judicial Advisers have repeatedly commented on the indifference on the part of the sub-ordinate Courts in the matter of pleadings. If care is taken in the initial stages of a case to scrutinize the pleadings and to examine the parties before issues are framed to elucidate obscurities in the plaint and the written statements, considerable waste of time and expense would be avoided and the decisions would be more satisfactory.

Mst. Zooni & Ors. V. Salam & Ors. Civil appeal No. 8 of 1948, 8 J&K LR 37 (Board of Judicial Advisers).

Civil Procedure Code (Act X of 1977) — Order XX Judgment — What is.

A judgment of a civil Court must contain a concise statement of the case, the points for determination. the decision thereon and the reasons for such decision.

Satar & Ors V. Razak & Ors. Civil IInd Appeal No. 25 Of 2005, 8 J&K LR 157 (H. C.) Single Bench.

Civil Procedure Code, 1977, (Act X of 1977) — Section 151 — Inherent power of the Court to remedy injustice done by abuse of process of Court — Circular No. 136. Order obtained by a party from Court by mis-representing facts — Power of Court to review its order although no review specifically provided in the said Circular.

It is a well settled principle of law that by adopting a procedure something has been done which the Court never intended to do and which results in the miscarriage of justice, then the Court has ample powers to remedy the wrong done. The injustice so done can be and must be remedied on the principle actus curia nominem grav: bit an act of the Court shall prejudice no person. An abuse of the process of the Court may result from a default or mistake of the Court itself or its officer or as the result of misrepresentation made by a party. In all such cases the Court has got an inherent power to make such orders, as may be necessary for the ends of justice or to prevent the abuse of the process of Courts.

Bhagat Prithvi Chand V. L. Narain Das. Civil Revision No. 28 Of 2006. 8 J&K LR 180 (H. C.) Single Bench.

Civil Procedure Code (Act X of 1977) :- Order 13 — Rule I — Plaintiffs producing a document in Court when both parties have adduced their evidence and all that remains for the Court is to hear arguments and then pronounce its decision — Genuineness of document denied by the defendant — Court giving decision without applying its mind to the genuineness of the document — Effect — Duty of Court.

Held that the decision was open to one grave objection. The Court did not apply its mind to the consideration of all important question as to whether or not the document was genuine. Its genuineness was stoutly denied by the defendant and apart from other circumstances tending to show that the document was not genuine, its belated production by the plaintiffs was itself calculated to give rise to grave suspicion. Where the Court took the genuineneness of the documedt for granted it begged the weole question. It had first to decide whether or not the document was genuine one.

177957

Samad and Others Versus Ghulam Nabi Shah and Others. Civil appeal No. 2 Of 1949. 9 J&K L.R. 203 (Board).

(a) Civil P. C. (1908) 0. 18, R. 2 — Personal evidence by parties — Evidence Act. (1872), S. 114.

It is a bad practice that when parties are in a position to give personal evidence they should refrain from entering the witness box. If such evidence is withheld without sufficient cause, the court is not only entitled but is bound to draw an adverse inference against the party who has thus withheld evidence. It is a still more objectionable practice to cite opposite side as one's own witness. This places the examination and cross-examination of such a witness in wrong hands, necessitates the criticism of the evidence by the side which had called it and this embarrasses fair trial and causes obstruction of justice.

Anno : C. P. C. 0. 18, R. 2, N. 1

Gandamal App : Vs. Bhulloo Ram. Respdt : Appeal No. I of 1950. D/- 15- 6- 1950, AIR 1951 J&K 5 (Board of Judicial Advisers).

Civil P. C. (1908), Order 47, Rule 1 — No review on ground of erroneous finding of fact.

An application for review cannot be entertained for reconsideration of a question of fact on which the Board, after considering all the circumstances of the case, arrived at a clear finding.

Anno. C P C, 0. 47, R. 1, N. 17 — A

Jana & Ors V. Ghulam Nabi, Review Appln. No. 3 of 50 D/- 11-6-1951, AIR 1952 J&K 12 (Board of Judicial Advisers).

Civil P. C. (1908), Order 47 Rule 1 — Question which might and ought to have been raised but not raised — No review for deciding such question.

Where a question based on certain amendment which miget and ought to have been raised before the Board at the time when the appeal was heard is not raised, no review can be granted for decision of such question.

Jana & Ors V. Ghulam Nabi, Review Appln. No. 3 of 50 D/- 11-6-1951, AIR 1952 J&K 12 (Board of Judicial Advisers).

Civil P. C. (1908), S. 35 — Successful party — Right to receive costs.

Costs awardable under Section 35 are in the discretion of the Court, but that discretion has to be exercised in a judicial manner on the basis of sound legal principle and not arbitrarily. One of such principles is that a successful party is entitled to costs, unless he is guilty of such misconduct as would disentitle him in the eye of law. Even then it is necessary for the trial Judge to record reasons for his not awarding costs to the successful party.

(Note :- In this case the High Court in revision set aside the order passed by the lower Court directing the successful party opposing a pauper application to bear his own costs).

Ghulam Rasul & Ors V. Gh. Qadir & Ors. Civil Rev. No. 52 of 2007 D/- 18th Jeth 2008, AIR 1952 J&K 17 (H. C.) S. B.

Civil P. C. (1898) — S. 100

That a person had been in adverse possession of property and had acquired mortgagee right by prescription is finding of fact.

Anno. Civil P. C. Ss. 100-101 N. 36.

Garibu & Ors V. Bh. Lakhshami Narain. Civil 2nd appeal No. 45

of 2006 D/-14-1-1952. AIR 1952 J&K 21 (H. C.) D. B.

Civil P. C. (1898) — S. 100 — Concurrent findings of fact — Interference with.

It is true that concurrent findings of facts are binding on the second appellate Court and cannot be challenged in second appeal but when they are based wholly upon surmises or conjectures without any positive evidence to support them, they can be set aside in second appeal.

Garibu & Ors V, Bh. Lakhshami Narain. Civil 2nd appleal No. 45 of 2006, D/-14-1-1952, AIR 1952 J&K 24 (H. C.) D. B.

Civil P. C. (1908) S. 100 — Question whether document is sham.

The question whether a particular transaction is a sham one or not, is a question of fact and in such a matter the Board is bound by the concurrent findings of fact arrived at by the Courts below.

Anno. C. P. C. S. 100 N, 54.

Sh. Raghunath Devi v. Kh. Samad Gashrn, Civil Appeal No. 2 of 1950 D/-18-6-1951, AIR 1952 J&K 30 (Board of Judicial Advisers).

Civil P. C. (1908), 0. 8. R 3 — In pleading gift denied in a general way but no specific plea tkaen in regard to attestation of the deed — At the trial execution of deed fully proved but evidence silent in regard to its attestation —

Party held was not bound to call evidence in regard to attestation and rejection of the deed on this ground held not justified.

Anno. C P C. O. 8, R. 3, N. 1.

Sh. Raghunath Devi V. Kh. Samad Gaseru, Civil Appeal No. 2 of 1950 D/-18-6-1951. AIR 1952 J & K 30 (Board of Judicial Advisers).

Civil P. C. (1908), S. 11 — Execution Proceedings — Point that subsequent execution application was not a fresh applicaiion finally decided by executing Court.

Point cannot be re-opened in a subsequent application.

Anno. C. P. C. S. 11 N. 23.

Hiranand V. Jyoti Ram Goel. 1st Appeal No. 6. of 2008 D/- 1st Chet 2008, AIR 1952 J&K 31 (H. C.) D. B.

Civil P. C. (1908), 0. 1 R. 10, 0- 28 Rr. 1. and 3 — Partition suit — Compromise between plaintiff and one set of defendants — Decree in terms of compromise and withdrawal by plaintiff— Court has no jurisdiction to transfer other set of contesting defendants as plaintiff.

Ordinarily, when the Court finds no impediment to the dismissal of a suit after the announcement of the withdrawal of the claim by the plaintiff it will simply dismiss the suit of the plaintiff which he has withdrawan but there are some exceptions to this rule as have been recognised in partition suits, account suits and partnership suits. In these suits if the plaintiff intends to withdraw from the suit the Court may not dismiss the suit merely because the plafntiff has withdrawn from the suit ; it will transpose the defendants who have vested rights as plaintiffs and the plaintiffs as defendants in the suit and allow the suit to proceed. The Court has to see whether or not the defendant will be prejudiced if the plainiiff is allowed to withdraw from the suit. The test to be applied is whether the defendant will be able to seek his remedy in a separate suit without any legal impediments. Mere inconvenience to a defendant would not justify the Court to disallow

the plaintiff from withdrawing the suit.

Where in a suit for partition and accounts the Court passes a decree in terms of the compromise entered into between the plaintiff and some of the defendants, the Court has no jurisdiction thereafter to transpose the remaining defendants who also claim a share in the property, as plaintiffs and the plaintiff as defendant, It is open to these defendants to file a separate suit to enforce their rights.

Anno. CPC. 0. 1, R, 10. N. 34, 35 and 36 ; Or, 23, R. 3, N. 20.

Gh. Mohd Sheikh V. Ahad Sheikh & Ors. Civil Revn. No. 89 of 2008 D/- 6-6-1952. AIR 1952 J&K 34 (H. C.) C. J.

Civil P. C. (1908), 0. 23 R. 1 — Suit for partition — Preliminary decree — Plaintiff withdrawing from suit — Suit cannot be dismissed.

In a suit for partition if preliminary decree is passed declaring and defining the shares of the several parties the suit will not be dismissed by reason of any subsequent withdrawal by the plaintiff, for the obvious reason that the rights declared in favour of defendants under the preliminary decree would be rendered nugatory if the suit should simply be dismissed. AIR 1934 Mad. 338, Ref.

Anno. CPC. 0. 23 R. 1, N. 10.

Gh. Mohd Sheikh V. Ahad Sheikh & Ors. Civil Revn. No. 89 of 2008 D/- 6-6-1952, AIR 1952 J&K 34 (H. C.) C. J.

Civil P. C. (1908), S. 115 and 0. 9, R. 13 — Order setting aside exparte decree — Revision — Interference in.

It is true that before an exparte decree is set aside the Court must come to a definite finding that there was sufficient cause for making such an order. But the discretion primarily for setting aside of the decree vests in the court and unless and until it is made to appear that the exercise of the discretion is arbitrarily or unreasonable, the High Caurt will not ordinarily interfere in revision. AIR 1944 Lah 397, Re. on.

Anno : Civil P. C ; 0. 9, R. 13 N. 30,

W. Jagat Ram V. Salam Joo & Ors. Civil Revn. No. 85 of 2008, D/- 12-9-1952. AIR 1953 J&K 11 (H. C.) D. B.

Civil P. C. (1908), Ss. 151 and 152 — Inherent power of Court to amend decrees.

Appellate decree of District Judge not in conformity with his judgment — Execution case coming before him in appeal — District Judge interpreting judgment but not bringing decree in conformity with it — District Judge held should have brought the decree in conformity with the judgment in exercise of his inherent jurisdiction.

Anno. Civil P. C. S. 151 N. 2 ; S. 152 N. 6.

Raja Sahib of Poonch V. Kirpa Ram. Civil Appeal No. 3 of 1951 D/- 19-8-1952. AIR 1954 J&K 23 (Board of Judicial Advisers).

Civil P. C. (1908), O. 20, R. 4 — Construction of judgment.

On a question of construction of the judgment the real intention of the Judge not expressed in the judgment may be irrelevant. It may also be irrelevant if the expressed intention is opposed to the real intention. But where the expressed intention corresponds to the real intention then in such a case, the interpretation put by the author on his own judgment cannot be wholly without value.

Anno. Civil P. C.,O. 20 R. 4 N. 7

Raja Sahib of Poonch V. Kirpa Ram. Civil Appeal No. 3 of 1951 D/- 1954-8-1952. AIR 1954 J&K 23 (Board of Judicial Advisers),

Civil P. C. (1908), O. 20, Rr. 6 and 4 — Decree not in con-

formity with judgment.

Decree for ejctment by Munsiff subject to payment by landlord of Rs. 720/- to tenant within two months - On appeal District Judge raising amount to Rs. 928/6/- and judgment requiring landlord to pay the said sum befcre ejecting tenant- Decree however requiring londlord to pay Rs. 928/6/- within two months before ejecting tenant- There was held discrepancy between judgment and decree of District Judge- Time limit not being fixed in his judgment it could not be imported in it from decree of Munsiff on the ground that the District Judge had allowed the appeal only to a limited extent and for the rest it had affirmed the decree of the Munsiff.

Anno. Civil P. C. O, 20, R. 4 N. 7 ; 0. 20, R. 6 N. 7.

Raja Sahib of Poonch V. Kirpa Ram. Civil appeal No. 3 of 1951 D/- 19-8-52. AIR 1954 J&K 23 (Board of Judicial Advisers).

Civil P. C. (1908), S. 152 and 0.20, R. 6 — Amendment of decree

Application for amendment of decree (which was not in conformity with judgment) made after application for execution of decree was finally rejected by High Court — Proceedigs for execution of decree and for its amendment held should have been taken simultaneously. Anno. Civil P. C. S. 152 N. 7 and 8.

Raja Shib of Poonch V. Kirpa Ram. Civil Appeal No. 3 of 1951 D/- 29-8-1952. AIR 1954 J&K 23 (Board of Judicial Advisers).

Civil P. C. (1898), S. 115 and 0. 6, R. 17 — Revision against interlocutory orders — (J&K. Civil P. C. (10 of 1977 Smt.), S. 115).

An order refusing to allow amendment of plaint thou oh interlocutory in nature is a case d.cided within the meanings f S. 115 and is open to revision. Meaning of 'case decided' discusRd. AIR 1948 Nag 258 (FB) ; 1926 Mad 1124 and 1939 Rang 22, hel. on.

Where in refusing to allow amendment of plaint t e subordinate Court has exercised its discretion arbitrarily the High Court would be justified in interfering with it in revision.

Section 115 (d), Jammu and Kashmir Civil P. C. gives wider powers of revision to the High Court than under S. 115 XICIL P. C.

Anno. CPC. S. 115 N. 4, 5, 20.

Mohd. Maqbul V. Kadir Munjgaroo & Ors. Civil Revn. Appln No. 12 of 2007 D/- 18-9-1953. AIR 1954 J&K 26 (H. C.) D. B.

Civil P, C. (1908), 0. 32, R. 7 — Scope —

A compromise in which a minor is a party cannot be reco ded without the leave of the Court and unless it is in the interest and for the benefit of the minor.

Mt. Taja V. Mst Azizi. Civil appeal No. 2 of 1953 D/- 18-6-1953. AIR 1954 J&K 31 (Board of Judicial Advisers).

Civil P. C. (1908), 0.47, R. 1, 0.32, R. 7, S. 151 — Compromise recorded when one of the parties was minor — No leave obtained — Application under S. 151 to set aside order recording compromise can be treatad as application for review.

The question whether an application made under S. 151, Civil P. C. could or could not be converted into an application for review under 0. 47, R. 1 of the Code depends upon the circumstance of each case. Where the order recording the compromise was obviously erroneous as it contravened the provisions of 0. 32, R. 7 of the Code and application to set aside the compromise was made within one month of the order recording the compromsie, in other words within the period of limitation allowed for an

application for review, the application should be treated as one under 0. 47, R. 1. even though it was in terms under S. 151. Order 47, R. 1 is wide enough to cover a case of this nature. The only impediment in treating this application as an application for review is the lack of payment of necessary court-fees, which can be demanded and made good at any stage of the proceedings.
Anno : Civil P. C ; 0. 47, R. 1 N. 2, 16, 16a. 22, 0. 32, R. 7 N. 5, 20 ; S. 151 N. 3.
Mst Taja V. Mst Azizi. Civil Appeal No. 2 of 1953 ; D/- 18-6-53 AIR *1954* J&*K* 31 (*Board of Judicial Advisers*).

Civil P. C. (1900) Ss. 11 and 96 — Appeal by successful party against adverse finding

Where a suit is decreed in favour of a party but there is an adverse finding against him on one point which is not at all necessary for passing the decree, the finding cannot operate as res judicate as between the parties and as such the successful party is not competent to appeal against that finding. 3 J&K LR 186, Rel. on ; Chitaley's Civil P. C ; Ref. to.
Anno. Civil P. C ; S. 11 N. 108, 109 and 110 ; S. 96 N. 6 Pts. 9, 12 and 14.
Mohd. Mir V. Gh. Mohiuddin & Ors. 2nd Appeal No. 35 of 2006 D/- 1 Bhadon 2007. AIR *1954* J&*K* 32 (*H. C.*) *S. B.*

Civil P. C. (1908), 0, 43, R. 1 (ii) and 0.20, R. 11 (2) (Jammu and Kashmir) — Order refusing instalments — Appealabilitry.

Both the orders fixing instantalments or refusing to fix instalments for the payment of the decretal amount by the executing Court would be made under sub-rule (2) of R. 11 of 0. 20 and an order under this sub-rule would be appealable under 0. 43, R. 1 (ii) (Jammu & Kashmir). If it is passed without the consent of the parties. It wou'd be doing nothing short of violence to the language of sub-rule (ii) of R. 1 of 0. 43 (Jammu and Kashmir) to confine its application to those orders alone by which fixation of instalments for payment of the decretal amount is made
Anno. Civil P. C : 0. 20, R. 11 N. 14.
Om Prakash V. J&K Bank Ltd Jammu. Civil Revn. No. 35 of 2009 D/- 8-12-1953. AIR *1954* J&*K* 39 (*H. C.*) *D. B.*

Civil P. C. (1908), 0. 20, R. 4 — Appealable cases

Court should pronounce its opinion on all important points involved in the case.
Anno. C. P. C ; 0. 20, R. 4. N. 6.
Gangu & Ors V. Lassa Zargar & Ors. Rev. 1st appeal No. 23 of 2008 D/- 5-4-54. AIR 1954 J&*K* 44 (*H. C.*) *S. B.*

Civil P. C. (1908), 0. 41, R. 1 — Presentation of memorandum of appeal.

It is true that an appeal must be presented by an authorized person, and if it is presented by a person who is not authorized to do so, it shall be rejected. But, where an appeal is presented by an authorized person, but in a wrong court and that court instead of returning the appeal to the appellant, itself sends it to the proper court which accepts the presentation, the appellant should not be made to suffer for the mistakes of the Court on the principle 'actus curiae neminem gravabit, and the appeal should not be dismissed.
Anno. C. P. C. 0. 41, R. 1 N. 2.
Gangu & Ors. V. Lassa Zargar & Ors. Rev. 1st appeal No. 23 of 2008 D/- 5-4-54. AIR 1954 J&*K* 44 (*H. C.*) *S. D.*

Civil P. C. (1908), 0.6,R.17,S.115 — Revision against order allow-

ing amendment — Acepetance of costs — Effect.

Order allowing amendment of plaint on payment of cost — Costs accepted by defendant and plaint amended — Acceptance of costs without prejudice to right to go in revision—Revision against order not barred.

Anno. C. P. C ; 0. 6, R. 17, N. 15.

1953 Mulla : 0. 6, R. 17, P. 595 N. " Leave ..... given " (Topic exhaustively dealt with in N. 15 to 0. 6 R. 17, in AIR Com, — 4 Pts. extra in AIR Com. note). C. P. C ; 0, 6. 17 N. 21. Civil P. C ; S. 115 N. 5. 1953 Mulla : S. 115, P. 410 N. " Interlocutory order" (Lahore view indicated in Mulla is based on over - ruled case in AIR 1924 Lah 425 — Later F. B. case AIR 1943 Lah 65 which over-ruled AIR 1924 Lah 425 not noticed in Mulla—Views of Ajmer - Merwara, Kutch, Madhya Bharat, Rajasthan and Lahore (subsequent to 1943 Lah 65 (FB) and conflct between Lahore and Allahabad views not noted in Mulla — Solution of conflict not indicoted).

Seth Kerpal Chand V. The Traders Bank Ltd, Civil Revn. No. 49 of 2009, D/- 11- 12- 1953. AIR 1954 J&K 45 (H. C.) S. B.

Civil P. C. (1908), 0. 29, R. 1, 0.3 Rr. [illegible] — Suit by corporation — Plaint signed and verified by manager — Subsequent ratification.

Order 29, R. 1, Civil P. C. does not authorise the person mentioned therein to institute suits on behalf of the corporation. tt merely authorizes those persons to sign and verify pleadings on behalf of a corporatton. The institution of the suit and the presentation of the plaint has to be done by the party in person or by his recognised agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf, as required by 0. 3, R. 1, C. P. C.

A plaint in a suit filed on behalf of a Bank was and verified by its manager who under the Articles of Association of the Bank, was authorised, with the previous sanction of the directors, to take legal proceedigs to recover the dues of the Bank. He did not hold any power of attorney on the date of the suit. On an objection by the defendant, an amended plaint was filed by the Bank stating that the Bank had, by its resolution, confirmed and ratified the menager's action. The Court allowed the amended plaint. On revision against the order.

Held that as the initiative to institute the suit could be properly transferaed to the Manager under the Articles of Association, the subsequent ratification of the act of the agent by the principal could cure the original defect. AIR 1936 Lah 321 and 25 All 635, Rel. on. AIR 1932 Lah 388 and 1935 Lah 345, distinguished. Case law reffered.

That the Court had rightly allowed the amendment of the plaint and there was no reason to drive the plaintiff non-applicant to institute a fresh suit.

Anno. CPC, 0. 29, R. 1 N. 2. 1935 Mulla ; 0. 29, R. 1 (Topic discussed in N. 2 to 0. 29, R. 1 in AIR Com. extro).

Seth Kirpal Chand V. The Traders Bank Ltd. Jammu, Civil Revn. No. 49 of 2009, D/- 11- 12- 53. AIR 1954 J&K 45 (H. C.) S. B.

Civil P. C. (1908), 0. 23, R. 3 : S. 96, 0.43, Rl (m) — Order recording Compromise — Appeal — (Debt Laws — J. & K. Agriculturists' Relief Act (1 of 1953),S.5(3).

There is an obvious distinction between an order recording an argreement, a compromise or satisfaction and the final decree that should be made in accordance therewith.

An order under Rule 3 of Order 23 recording or refusing to record an agreement, a compromise or satisfacrion is appealable under 0. 43, R. 1 (m) irrespective of the consideration whether the decree that followed it was a constant decree or not. The restriction that consent of the parties takes away the right of appeal does not attach to the order.

But under S. 5 (3). J. and K. Agriculturists' Relief Act no appeal lies from any order passed by the Court in any such suit with the exception of the order specified in Cl. (h) of S. 104, Civil P. C; and. therefore, an order recording an agreement, a compromise or satisfacfion under 0. 23, R. 3, is not appealable and the only remedy by which a glaring injustice arising from such an order can be got removed is to apply in revision.

Anno. CPC. 0. 23, R. 3, N. 32 ; 0. 43. R. 1, N, 7 : S. 96 N. 15. Cases referred.

AIR 1933 Bom 205 : 57 Bom 206, AIR 1944 Bom 239 (2) : ILR 1944 Bom 405, AIR 1936 Mad 385 : 163 Ind Cas 161, AIR 1934 Cal 846 : 61 Cal 910.

J. L. Raina & Ors. V. P. L. Raina & Ors. Civil Misc. Appeal No. 6 of 2010 D/- 11- 12- 53. AIR 1954 J&K 55 (H. C.) D. B.

Civil P. C. (1908), 0.6,R.17 — Object and scope — Suit for permanent injuction — Amendment seeking new relief of possession can be allowed —

The main object of allowing amendments is to get at the rights of the parties and to avoid multiplicity of suits. But there is one condition, and that is that it should be possible to settle the dispute in the suit already instituted without unfairness or injustice to the opposite party.

In a suit for permanent injunction to restrain the defendants from interfering in the plaintiff's possession an application seeking permission to amend the plaint was made stating that the defendants took forcilbe possession of the land in dispute during the pendency of the suit and the plaintiff be permitted to seek further relief of possession. The defendants resisted it on the ground that it would change the nature of the suit :

Held, that if the amendment was not allowed, it would mean that the plaintiff should bring another suit. Such a state of affairs could be easily avoided by an amendment. It should therefore be allowed. AIR 1942 Sind 4 Dissented from. Chitaley's Civil P. C. pp, 1754 - 55 and other case law referred.

Anno. Civil P. C. 0. 6, R. 17 N. 1, 2, 9.

Cases ref rr d :- AIR 1927 Oudh 513 ; 105 Ind Cas 784, 1950 Pepsu 21. 1935 Mad 286 : 155 Ind Cas 1016, 1942 Sind 4 : 198 Ind Cas 69,.

Mst- Dedri V. Mst. Khatji & anr. Civil Revn. No. 29 of 2011 D/- 23- 8. 1954. AIR 1954 J&K 63 (H. C.) S. B.

Civil P. C. (10 of 1977 Smt,) (before amendment of 2011), Ss. 44 and 2(5) — Definition of "foreign Court" — Repugnancy to Arts. 5 and 261 (3) of Constitution — Ex parte decree passed by Amritsar Court against State subject on 4. 6. 51 — Decree if executable in State — (Civil P. C. (1908), Ss. 2(5) and 44) — (Constitution of India, Arts. 5 and 261 (3).

The definition of 'foreign Court' in J. and K. Civil P. C. before amendment of 2011 must be held subservient to the provisions in the Constitution of India, namely Art. 5, conferring on the State subjects the citizenship of India and Cl. (3) of Art. 261 by which final judgments or orders delivered or passed by civil courts

in any part of the territory of India are made capable of execution anywhere within that territory. The definition of 'foreign Court' must to the extent of its repugnancy to the provisions indicated above be held inoperative and of no effect.

Therefore an expparte decree passed by the Amritsar Court on 4-6-1951 against the State subject was executable in the State Courts on the date when the decree-holders' application for execution instituted on 27-10-1951 was rejected by the executing Court at Jammu on 25-10-1952. Anno. AIR Com.: Const. of India. Art. 5 N. 1. S. 2 (5) P. 10 (7 Pts, extra in AIR Com) AIR Com: Civil P.C; S. 44 N. 2. 1953 Mulla: S. 44 (Topic discussed in AIR Com; extra)

Cases Referred. A. 22 ('94) 22 Cal 222: 21 Ind App 111 (PC)
B. AIR 1953 Hyd. 19: ILR (1952) Hyd 1030
C. 1955 Madh-B 1: Madh-B L.J 1954 HCR 1111 (FB)
D. 1951 Bom 190: ILR (1950) Bom. 640.

M. L. Saraf V. Firm Bhagwan Das Gurdyal. First Appeal No. 32 of 2009, D/-19-1-1955. AIR 1955 J&K 5 (H. C.) F. B.

Civil P. C. (1908), 0. 41, R. 27 — Record of reasons — Failure to — Effect.

The contention that the lower appellate Court did not give any reasons for allowing the respondents to produce additional evidence is not tenable where it was found from the material on the record that there were circumstances which justified it to allow the party to adduce additional evidence.

Anno. AIR Com. C. PC; 0. 41, R. 27 N. 10: 1953 Mulla, 0. 41. R. 27, EP. 1221 N. 'Recording rulings in ('67) 11 Moo Ind App 345 (368) and AIR 1939 PC 152 (154) and contra views in AIR 1923 All. 413; AIR 1921 All 408: AIR 1915 Mad 588: 2 Ind Cas 995; AIR 1939 Bom 401 and AIR 1936 Lah 138 not noticed in Mulla).

Gh. Qadir & Ors. V. Sultan & Ors. 2nd Appeal No. 18 and Civil Revn. No. 113 of 2011 D/-17-2-1955. AIR 1955 J&K 23 (H. C.) D. B.

Civil P. C. (1908), 0. 41, R. 27 — If the appellate Court requires it — Considerations for.

Ordinarily the appellate Court should not allow a party to adduce additional evidence to patch up the weak parts of his case and fill up the omissions by adducing additional evidence, but where the appellate Court finds that there was substantial cause for non-production of evidence in the lower Court and additional evidence is required to clear up a point in the interest of justice it may allow the party to produce additional evidence.

Held, in the circumstances of the case, that the lower appellate Court was perfectly justified in allowing the documents

Anno: AIR Com; CPC; 0. 41, R. 27 N. 4: 1953 Mulla, 0. 41, R. 27, P. 1218 N. "When.....admitted" (AIR 1937 Pat 584 which construes AIR 1931 PC 143 not noticed in Mulla).

AIR Com; CPC; 0. 41, R. 27 N. 8; 1953 Mulla. 0. 41, R. 27. P. 1220 N. "Or.....cause" (13 Pts. extra in AIR Com. — Footnotes in AIR Com. exhaustive and illustrative — Views of other High Courts not noticed in Mulla).

Gh. Qadir & Ors. V. Sultan & Ors. 2nd Appeal No. 18 and Civil Revn. No. 113 of 2011 — D/- 17-2-1955. AIR 1955 J & K 23 (H. C.) D. B.

Civil P. C. (1908), 0. 8, R. 6—Counter-claim—Opportunity to plaintiff to meet it — Court fee to be paid (Court-fees Act (1870), Sch. I, Art. I.)

A counter - claim requires to be properly stamped and an opportunity should be given to the plaintiff to meet the counter-claim of the defendant.
Anno. AIR Com. C. P. C ; 0.8,R.6,N.15.
1953 Mulla : 0. 8, R. 6, P. 534 N. "Counter-claim (4 Pts. extra in AIR Com. — Calcutta, Patna and Bombay case law and AIR 1943 PC 29 not referred in Mulla).
C. F. Act, Sch. I, Art. 1, N. 3.
Ghulam V. Ghulam Ahmed & Ors. 2nd Appeal No. 130 of 2011 D/- 5- 1- 1956. AIR 1956 J & K 38 (H. C.) S. B.

Civil P. C. (1908), S. 149 — Counter - claim set up in suit — Court may allow defendant to pay Court - fee — (Court - fee Act (1870), S. 12).

Where the written statement filed by the defendant is treated as the plaint in the cross-suit instituted by him, the Court may in its discretion under S. 149 Civil P. C ; allow him to pay court-fee even after the decree in the suit. AIR 1936 Cal 277 and 1939 Bom 386 Rel. on.
Anno. AIR Com. C. P. C ; S 149, P. 475 N. "At any stage" (Conflict views under former Code indicated in S. 7 to S. 149 in AIR Com. — All points (16) in N. 7 to S. 149 in AIR Com. extra — AIR 1933 Cal. 27. referred in Mulla, not referred in N. 7 to S. 149 in AIR. Com Court-fees Act, S. 12 N. 6.
Cases Referred : AIR 1924 Rang 346 : 2 Rang 276, 1932 Bom 617 . 141 Ind Cas 287. 1936 Cal 277 : 167 Ind Cas 265, 1939 Bom 386 : 166 Ind Cas 464.
Ghulam V. Ghulam Ahmed & Ors. 2nd Appeal No. 130 of 2011 D/- 5- 1- 1956. AIR 1956 J & K 38 (H. C.) S. B.

Civil P. C. (1908), 0.8,R.6 — Counter-claim and set of — Difference between.

Set off and counter-claim are both cross-actions but a set off is also a ground of defence. On the other hand counter-claim is really a weapon of offence and enables a defendent to enforce a claim against the plaintiff as effectively as in an independant action. The main purpose of allowing a defendent to set up a counter - claim is to avoid multiplicity of proceedings between the parties. AIR 1232 Bom 617, Rel. on.
Anno. AIR Com C. P. C ; 0. 8, R. 6. N. 15.
1953 Mulla : 0. 8, R. 6. P. 634 N. "Counte-claim" (4 Pts, extra in AIR Com. — Calcutta, Patna and Bombay case law and AIR 1933 PC 29 not referred in Mulla).
Ghulam V. Gh. Ahmed & Ors. 2nd Appeal No. 130 of 2011, D/- 5- 1- 1956. AIR 1656 J & K 38 (H. C.) S. B.

Civil P. C, (1908), 0. 8, R. 6 — Suit for possession — Defendant can set up specific performance by way of counter-claim.

In a suit for recovery of possession the defendant can set up a counter - claim for specific performance of an agreement to sell and the counter - claim can be treated as the plaint in a cross suit and both the suits can be disposed of together. 1924 Rang 346, Foll.
Anno. AIR Com. C. P. C : 0. 8, R. 6 N. 15.
1953 Mulla : 0. 8, R. 6, P, 634 N. "Counter-claim" (4 Pts. extra in AIR Com. — Calcutta, Patna and Bombay case law and AIR 1933 PC 29 not refarred in Mulla).
Ghulam V. Ghulam Ahmed and Others, 2nd appeal No. 130 of 2011 D/- 5- 1- 1656. AIR 1956 J&K 38 (H. C.) S. B.

Civil P. C. (1908), 0. 8, R. 6 — Counter claim.

A counter claim need not be an action of the same nature as the original action or even analogous thereto. Though there is no provision in the Code of Civil Procedure for making a counter claim, a Court has still power to treat the counter-claim as the plaint in a cross suit and hear the two together. The only limitation is that the Court should be competent to hear the cross-suit. Chitalay's Civil P. C; 5th Edn; Vol. 2, 0. 8, R. 6 Note 15, Rel. on.

Anno. AIR Com; C. P. C; 0. 8, R. 6 N. 15,
1953 Mulla: 0. 8, R. 6, P. 634 N. "Counter-claim" (4 Pts extra in AIR Com. | Calcutta, Patna and Bombay case law and AIR 1933 PC 29 not referred in Mulla).

Ghulam V. Ghulam Ahmed & Ors, 2nd Appeal No. 130 of 2011 D/- 5-1-1956. AIR 1956 J&K 38 (H. C.) S. B.

Code of Civil Procedure (Act X of 1977) — Order XXII — Rule 4 —

Will in favour of 4 persons bequeathing specified portions of immovable property — Plaintiff being nearest reversioner brought a suit for declaring the will ineffective and void against his interest — Suit dismissed by trial Court — Appeal — During the pendency of appeal one of the legatee died leaving behind him his two wives, two sons and Three daughters — not brought on record — Whether the appeal abates as against the respondents.

Abatement under order 22 r. 4, will in the first instance be only so far as the deceased defendant or respondent is concerned. If, however, on account of this partial abatement it becomes impossible to proceed with the suit or appeal to its final conclusion, the entire suit or appeal must fail. From this it naturally follows that if the suit or appeal can proceed to a final conclusion with respect to the other defendants or respondets the partial abatement will not affect the rest of the suit or appeal. In the present case the rights of the various legatees in the bequeathed property are ascertained and ascertainable and as such the abatement as against the deceased respondent will not affect the rest of the appeal.

AIR 1933 Lah. 556, 1933 Lah. 1001, 1928 Lah. 573; F. B. & 1930 Lah. 127 referred to.

Thakur Dass V. Amar Nath & Ors. Civil Second Appeal No. 54 Of 2005, 8 J&K LR 147 (H. C.) D. B.

Code of Civil Procedure (Act X of 1977) Section 11 — Res-Judicata.

Held that in order that a previous decision in a suit is made applicable to a particular case on the ground of res-judicata it is necessary that :-

(a) the matter directly and substantially in issue in the subsequently suit must have been directly and substantially in issue in the former suit.
(b) the former suit must have been between the same parties or under whom they or any of them claim;
(c) such parties must have been litigating under the same title in the former suit as in the present suit;
(d) the Court trying the former suit must have been a Court of competent jurisdiction and the matter in issue in the subsequent suit must have been heard and finally decided in the first suit.

Ramloo Malik & Ors. V. Abdullah & Ors. Civil Appeal No. 10 of 2006. 8 J&K LR 204 (H. C.) D. B.

Code of Civil Procedure (Act X of 1977)—Section 144 Order passed

under Circular No. 136 — Can restitution be ordered.

Held that this is a relief which every successful suitor can claim. The right to restitution is an inherent right possessed by every suitor apart from section 144 CPC and the jurisdiction to make restitution is inherent in every Court and shall be exercised whenever the justice of the case demands. Powers can be exercised under section 151 CPC when the case cannot come strictly under section 144 CPC.

S. Seva Singh V. Ghulam Mohd. Civil Revision No. 6 of 2006, 8 J&K LR 198 (H. C.) S. B.

Code of Civil Procedure (Act X of 1977)—Section 115 — Order passed by the Munsiff in pursuance to circular No. 136—Order revisable.

Held that reference to the circular would show that the jurisdiction in the matter has been given to the judicial court and not to an individual judge as persona designata and as such any order passed by a court under circular No. 136 is clearly revisable by this Court

S. Seva Singh V. Ghulam Mohd. Civil Revision No. 6 of 2006, 8 J&K LR 198 (H. C.) Single Bench.

Code of Criminal Procedure (Act No. XXIII of 1989) :- Sections 164, 364 and 533 — Rule 10 Chapter XII of General Criminal Rules — No. Memorandum of Enquiry entered before recording of statements — Statements recorded in narrative from without questions and answers under section 364—No Certificate entered at end of statements under section 164 — Magistrate stating in Court that he told the accused that they were not bound to make the statement and that they would be used against them and that he was satisfied that the statements were voluntary — — Whether defects curable under section 533.

Held that only formal defects in recording confessional statements could be cured under section 533 Criminal Procedure Code and not the defects of substance. Failure to record the certificate at the foot of the statement under section 164 Criminal Procedure Code or where no attempt had been made by the magistrate to comply with the requirements of sections 164 and 364 Criminal Procedure Code, makes such a statement inadmissible in evidence and even extensive evidence of the magistrate that he had complied with such requirements does not remedy the defect.

Atta Mohamad Versus State. State Versus Ghulam Moh'd. State Versus Ghulam Moh'd And Others. Criminal First Appeal No. 55 of 2006. Criminal Reference No. 10 Of 2006. Criminal Revision No. 58 Of 2007. 9 J&K L. R. 137 (H. C) D. B.

Cognizance of suit by a Revenue Court—Law in joint possession — One of the co-sharer sells his share to A who again sells it to B — Suit by B for joint possession — No prayer for delivery of any specific plot of land — Whether suit cognizable by a Revenue Court.

Held that the proposition apears to be very obvious that a person who is in joint pssession of a land can transfer his interest in the joint holding to anybody and transferee having purchased the interest in the joint holding is entitled to be recorded as in joint possession with the other co-sharer in the same way and to the same extent as the transferor was entitled. The prayer in the plaint was for joint possession and not for the delivery of any specific plots of land. If by an arrangement between the share-holders either a share-holder or his transferees were allowed to

remain in possession of certain plots before partition was claimed, the transferees in turn like the plaintiff would also be entitled to remain in possession till one of the share-holders claimed partition and such a suit alone would be exclusively cognizable by a Revenue Court.

Habib Kuttoo & Ors. V. Pt. Shamlal Bhat, Civil Appeal No. 6 Of 1949, 8 J&K LR 31 (Board of Judicial Advisers)

Comapnies Act, (1913) S. 166 (aa) — Petition after voluntary liquidation.

Section 166 is applicable only in case the Company is carrying on its business. After the Company has gone into voluntary liquidation the Registrar cannot ask for compulsory winding up of the company, AIR 1941 Bom. 25 Disting. Anno. Companies Act, S. 166 N, 1.

In the matter of J & K Industries Ltd. Jammu. Appln. No. 16 of 2008, D/- 24- 4- 1953. AIR 1954 J&K 10 (H. C.) C. J.

Companies Act (1913), Ss. 166 abd 218 — Registrar's right to apply—(Jammu and Kashmir Comapnies Act (1977), Ss. 166, 218).

Under S. 166, Companies Act the Registrar is entitld to present an application for winding up of the company where it is carrying on its business and not after it has gone into liquidation. There is no other provision in the Companies Act by which the Registrar has the right to institute an application for compulsory winding up of a Company when it has already been voluntarily wound up. On the other hand while the right of applying to the Court for winding up has been given to the Company or to any of its creditors or contributories or the Registrar under S. 166 of the Jammu and Kashmir Companies Act, 1977, S. 218 of the Act expressly lays down the winding up of a Company shall not bar the right of a creditor or a contributory to have it wound upby the Court. The omission of the Registrar from the provision of section 218 is exceedingly significant and shows that the Registrar has no right to take initiative in such matter. Anno. Com. Act, 156 N. 1; S. 218, N. 1.

Registrar Joint Stock Companies J&K Govt. Versus Mr. Harbans Bhagat & Ors. 1st Appeal No. 13 of 2010 D/- 20- 12- 1954. AIR 1955 J & K 32 (H. C) D. B.

Companies Act (1913). Ss. 209 A, 207 (3) and 203 (3) — Extraordinary resolution and special resolution — Distinction — — Mistake in giving resolution its proper name—Effect—(Jammu and Kashmir Companies Act (1977), of Ss. 203, 207, 209 A).

The only difference between an extraordinary resolution and a special resolution is that in order to move a special resolution a notice of not less than 21 days specifying the intention to propose a resolution, is to be given vide Section 81 of the Jammu and Kashmir Companies Act 1977. Thus where a special resolution has been passed, it does not show that any prejudice has been caused to the interests of either the members or the creditors of the Company. The passing of a special resolution instead of an extraordinary resolution would rather more fully safeguard the interests of both. In a case, however, where all the formalities specified in S. 209 — A have been complied with a mere technical mistake in giving the resolution its proper name cannot amount to a defect which will in any way vitiate or invalidate the act of voluntary winding up of the Company.

Anno. Comapnies Act, S. 203 N. 1; S, S. 207 N. I; S, 209 A N. 1.

Registrar J. S. Companies J&K Govt. Versus Mr Harbans Bhagat and others. First Appeal No. 13 of 2010. D/- 20- 12- 1954. AIR 1955 J&K 32 (H. C.) D. B.

Compromise — Minor a party — Whether leave of the Court necessary.

A compromise in which a minor is a party cannot be recorded without the leave of the Court and unless it is in the interest and for the benefit of the minor.

Mt. Taja V. Mst Azizi, Civil appeal No, 2 of 1953 D/- 18- 6- 1953. AIR 1954 J&K 31 (Boa:d of Judicial Advisors)

Concurrent Findings of Fact in Second Appeal are conclusive.

Concurrent finding of the first two Courts not being vitiated by any error of law, is conclusive in second appeal.

Abdul Ghani & Ors. (Pltffs. Applts) Versus Ch. Ghulam Ahmed & Ors. (Defdts. Respdts) Civil Appeal No. 21 Of 1947, 6 J & K LR Page 160 (Board of Judicial Advisers)

Confession — Whether must be accepted in entirety by a court.

A Court is not bound to accept the confession of an accused in its entirety; and it can disregard any portion of that statement which it considers unreliable and it can even vary and modify that statement by adding its own inferences provided these inferences are based upon some legal evidence in the case.

Sain Shah V. State Cr. Appeal No. 3 of 1947 — 6 J&K LR Page 45 (Board of Judicial Advisers)

Confession of guilt before the Committing Magistrate.

Held that the case against the accused appears to us to be proved to the hilt that he is personally responsible to have committed the murder.

Thakur Dass V. State, Criminal Appeal No. 2 of 1949, 8 J&K LR 99 (Board of Judicial Advisers)

Confession — Retracted — Evidentiary value of —

It is not illegal to base conviction on a retrated confession but the rules of prudence require that a retracted confession must be corroborated by independent evidence connecting the accused with the crime,

Anno. CrPC S. 164 N. 18 Pt. 1.

Samad Malik V. State. Cr. 1st appeal No. 8 of 2009, D/- 9 Assuj 2009. AIR 1653 J&K 1 (H. C.) D. B.

Confession — Value and corroboration — Antecedent recoveries whether can be used to corroborate.

Antecedent recoveries cannot in any way be used to corroborate or to test the truth or otherwise of a confessional statement. At the most these can be taken as a part of the statement and cannot in any way add to its weight.

Anno. Evi, Act, S. 24 N. 8,

Abdul Salam V. State, Cr. 1st appeal No 29 of 2007, D/- 10-4-1951 AIR 1954 J&K 1 (H. C.) D. B.

Confession — Retracted — Evidentiary Value of —

It is not illegal to found a conviction on a retracted confession, provided it can be held to be voluntary and true. But the rule of prudence and caution which has been invariably followed by the Court in this respect is that a retracted confession is not better than tainted evidence and it should not be accepted, unless it is coroborated by credible independent evidence.

Anno. Evi. Act, S. 24 N. 9; Cr. P. C; S. 164 N. 18.

Ab. Salam V. State, Cr. 1st. appeal No. 29 of 2007, D/- 10- 4- 51. AIR 1954 J&K 1 (H. C.) D. B.

Confession extra — judicial — value of.

In ordinary circumstances extra - judicial confession are not entitled to weight because it is impossible to ascertain the exact words used by the accused in such cases. Where not only it is not possible to find out what exact words were used by the accused in the extra-judicial confession but also there is definite conflict between the statements of witnesses proving the extra-judicial confession as regards the perpetrator of the crime the extra - judcial confession must be altogether discarded. In any case it cannot be described as credible independent evidence which can be deemed sufficient for the purpose of corroborating a retracted confession.
Anno. Evi. Act, S. 24 N. 8.
Abdul Salam V. State, Cr. 1st. appeal No. 29 of 2007, D/- 10- 4- 1951. AIR 1954 J&K 2 (H. C.) D. B.

Confession — What is — Accused keeping silent — Would it constitute confession.

In a criminal case if an accused keeps silent and does not speak, it would not amount to confession of the guilt on his part The confession of the accused should be in an unequivocal term admitting the confession of the crime.
Anno. Evidence Act S. 24 N. 2.
Isher Dass V. State, Case No. 9 of 2007, D/- 26th Maghar 2007, AIR 1954 J&K 19 (H. C.) D. B.

Confession — Immediately after police custody — After confession returned to police custody for being taken to maternity hosptial for delivery — No value — Cannot be regarded as free from police pressure.

Where the accused was sent to the Magistrate direct from the police custody and after the statement she was again returned to the police custody as she was to be taken by the police to the maternity hospital for being delivered and she was then expecting child-birth at any moment, a confessional statement record d in such circumstances loses much of its value and cannot be deemed to have been entirely free from police pressure,
Anno. AIR Com. Cr. P. C. S. 164 N. 17 Pt. 8. AIR Man. Evi. Act. S. 26 N. 4.
Mst. Aranditti V. State. Cr. 1st. appeal No. 4 of 2011, D/- 22- 5- 55. AIR 1955 J&K 13 (H. C.) D. B.

Constitution Act (XIV of 1996)—Section 5 — His Highness inherent powers—When exercisable by a Minister.

His Highness' pleasure is not exercisable through his Ministers forming the Government unless there is an express delegation of powers to that effect.
Major Anchal Singh Plaintiff V. His Highness Government Defendant Original Case No. 7 of 2002, 6 J & K LR Page 21 (H. C.) F. B.
Ed. Note ..... Reversed in 1951 J & K I by Board of Judicial Advisers.

Constitution Act (XVI of 1996) — Section 5 — Inherent powers of His Highness to make laws or issue ordinances—Section 38—Ordinance passed by His Highness on the recommendation of the Council remains in force for six months only. Distinction between section 5 and 38.

Held that for an Ordinance passed by His Highness under Section 5 cf the Constitution Act, 1096, by virtue of the inherent powers reserved in him, no time limit is prescribed in the Act and such an Ordinance will continue to exist as long as it is not

repealed by the authority promulgating the same while an Ordinance issued under Section 38 of the Act remains in force only for six months.

Ghulam Nabi Bazaz & Others Versus State. Criminal Revision No. 28 of 2006. 9 J&K. L. R. 18 (H. C.) Single Bench.

Constitution of India — Art. 370 — extent of the application of Indian Constitution to the State of Jammu and Kashmir.

Under Art. 370 only such provisions of the Constitution could be declared by the president in consultation with the State Govt. to apply to the State of Jammu and Kashmir as related to matters specified in the Instrument of Accession. The Article has not been specifically excluded from the Second Schedule to the Constitution (Application to Jammu and Kashmir) Order 1950 only through an oversight or in-advertence. State Constitution Act is clearly saved under clause 8 of the Instrument of Accession and it remains materially unaffected by Art. 370 of the Indian Constitution.

Maghcr Singh & Ors. V. Principal Secretary J&K Govt. Civil 1st Appeals No. 29 of 2008 and No. 4 of 2009 — D/- 25- 3- 1953. AIR 1953 J&K 26 (H. C.) D. B.

Constitution Act — Powers of His Highness — Power and jurisdiction of the Head of the Administration appointed during the period of emergency — Whether the Head of the Administration could issue Ordinance No. XXI of 2004 — and whether it was ultra vires of the powers conferred by His Highness.

Held that under section 4 of the Constitution Act, His Highness can suspend the constitution or replace the existing administrative machinery by a different Agency altogether. Under section 5 of the Constitution Act, His Highness can pass any orders and ordinances on his own motion. Obviously then, the Head of the Administration has been appointed in exercise of his inherent authority and powers saved by sections 4 and 5 of the Constitution Act. therefore the moment the Head of the Administration was appointed with powers to deal with emergency he must be presumed to have been invested with authority and jurisdiction which appertain to or are incidental to the Administration of the Jammu and Kashmir State during the period of emergency. This would certainly give fullest authority to the Head of the Administration to pass orders and ordinances incidental to the administration of the State. The powers of the Head of the Administration not having been defined in the order of appointment, a general delegation of all powers - executive and legislative have to be presumed which are necessary for dealing with the emergency

Further held that there is an assumption in favour of the legality of a Statute and a Statute should not be held to be unconstitutional or ultra vires unless it is clearly repugnant to the Constitution. Whatever doubts one may have entertained as regards validity of the said ordinance must be completely set at rest after the confirmation of His Highness.

Magher Singh & Ors. V. Principal Secretary J&K Govt. Civil 1st. Appeals No. 29 of 2008 and No. 4 of 2009 — D/- 25- 3- 53. AIR 1953 J&K 26 (H. C.) D. B.

Constitution of India Act. 254 — Whether applicable to the State of Jammu and Kashmir — Whether there is any clash between it and section 6 of J&K. Land Acquisition Act.

Even assuming that there is some clash between these Acts. Art. 25 of the Constitution of India cannot be invoked for the purpose. Art. 254 is really not applicable to the State of Jammu

and Kashmir. The condition precedent for the application of Art. 254 is that it should relate to a provision of law in the concurrent list with respect to which Parliment has power to make laws for the State. In the absence of such power and in the absence of the application of list III of the Seventh Schedule to the State the question of any provision of law made by the State Legislature being repugnant to any provisions of a law made by Parliment which Parliament is not competent to enact for the State or to any existing law does not arise, and the J & K Big Landed Estates (Abolition) Act cannot be held ultra vires of the powers of Yuvrja on this ground.

Maghar Singh & Ors. V. Principal Secy. J&K Govt. 1st. appeals No. 29 of 2008 and 4 of 2009 D/- 25- 3- 1953. AIR 1953 J&K 26 (H. C.) D. B.

Constitution of India — Article 385 — Whether applicable to the State of J&K.

Article 385 does not in terms apply to the State of Jammu and Kashmir.

Maghar Singh & Ors. V. Principal Secretary J&K Government 1st. Appeals No. 29 of 2008 and 4 of 2009 D/- 25- 3- 1953. AIR 1953 J&K 26 (H. C.) D. B.

Constitution of India — Whether abrogated S. 5 of the Constitution Act of 1996.

S. 5 of Jammu and Kashmir Constitution Act 1996 is neither abrogated nor superseded by the provisions of the Indian Constitution by virtue of the proclamation of 26- 11- 1249.

Maghar Singh & Ors. V. Principal Secretary J&K 1st. Appeals No. 29 of 2008 and 4 of 2009, D/- 25- 3- 1953. AIR 1953 J & K 26 (H. C.) D. B.

Constitutional Law — Legislature.

The Government can exercise only these powers which have been delegated to it by the legislature. Governments have no inherent powers of their own. They have to execute the wishes of the legislature which in fact has the sovereign authority. If the legislature does not in specific words authorize the Government to take a certain action against a person who is dealt with under some law, the power to take such action cannot be presumed without a clear provision of law.

Gh. Nabi Jan V. State Misc. Cr. Case No. 109 of 2010. D/- 28- 7- 1953. AIR 1954 J&K 7 (H. C.) D. B.

Constitutionality of a statute — Whether invalid merely because the statute is opposed to the spirit of the Constitution — the test.

No statute can be held invalid on the ground that it is opposed to the spirit of the Constitution. Whether an Act is ultra vires or not has to be seen with reference to the provisions of the Constitution alone and nothing else. It is fundamental rule of interpretation of statutes that there should always be a leaning towards holding a statute as constitutional and intra vires. AIR 1951 All 476 (FB) and 1950 SC 27, Rel. on.

Held that S. 19 of the Preventive Detention Act cannot be said to be ultra vires of the Constitution on the ground that it is not in accordance with the spirit of the Constitution'

G. A. *Ashai V. State, Cr. Misc. Appln. No. 4 of 2010. D/- 22- 7- 1954. AIR 1954 J&K 59 (H. C.) F. B.*

Constitution of India, Art. 245 — Constitutionality of an Act — Tests of — S. 19, Preventive Detention Act — Validity — (Public

Safety — Preventive Detention Act. (1950, S. 19).

No statute can be held invalid on the ground that it is opposite to the spirit of the Constitution. Whether an Act is ultra vires or not has to be seen with reference to the provisions of the Constitution alone and nothing else. It is fundamental rule of interpretation of statutes that there should always be a leaning towards holding a statute as constitutional and intra vires. AIR 1951 All 476 (FB) and 1950 SC 27, Rel. on.

Held that S. 19 of the Preventive Detention Act cannot be said to be ultra vires of the Constitution on the ground that it is not in accordance with the spirit of the Constitution.

G. A. Ashai V. State, Cr. Misc. Appln. No. 4 of 2010 D/- 22-7-1954 AIR 1954 J&K 59 (*H. C.*) *F. B.*

Constitution of India — Art. 20 — Whether Preventive Detention Act (1950) contravenes this Article.

It is true that Art. 20, Constitution of India forbids the trial and conviction of a person according to a law which was not in force at the time when the offence was committed; but procdedings under the Preventive Detention Act are not judicial proceedings and preventive detention by itself is not a conviction or sentence of imprisonment. Section 19 which is of the nature of an expost facto law which has been framed to govern the cases of those detenus who were arrested under earlier laws now repealed and whose remedies available to them then have now been taken away from them, does not, therefore, contravene the provision of Art. 20.

G. A. Ashai V. State Cr. *Misc. Appln. No. 4 of 2010 D/-22-7-1954 AIR 1954* J&K 59 (H. C.) *F. B.*

Constitution of India—Arts. 5 and 261 (3) — Whether repugnant to Ss. 44 and 2 (5) of C. P. C. (Act 10 of 1977 Smt) before amendment of 2011).

Now, while the definitions of 'foreign Court' and 'foreign judgment' happened to remain unaltered in the State Civil P. C. till 24-4-1954, a great change had been effected in the State Constitution. Our State acceded to India on 28-10-1947 and, when the Constitution of India came into operation on 26-1-1950, it was clearly provided therein (vide Article 1 and Schedule I to the Constitution) that the State of Jammu and Kashmir was one of the part B States and its territories formed part of the territories of India. It, therefore, follows that after this change in the status of this State was brought about a Court exercising jurisdiction in other States of India could not be regarded as a 'foreign Court'. The executing Court of the Subordinate Judge, Jammu, might, however, have been misled by the fact that the Constitution (Application to Jammu and Kashmir) Order, 1950 did not make Art. 5 of the Constitution which contains the definition of a citizen of India applicable to the State.

But whatever doubt there may have been as regards the position of the State subjects outside the State in India at that time, it has become absolutely clear that since the promulgation of the Constitution (Application to Jammu and Kashmir) Order, 1954 the subjects of this State became full citizens of India with effect from 26-4-1950 (vide paragraph (3) of the said order). Under these circumstances, it cannot be said that the exparte decree which was passed in this case by the Senior Subordinate Judge of Amritsar on 4-6-1951 was passed against a non-resident foreigner. It was clearly passed against a person who had become a citizen of India at that time.

(2) Further by the Constitution (Application to Jammu and

Kashmir) Order, 1950 Art. 261 (3) of the Constitutlon became applicable to the State and it reads as follows :-

"Final judgments or orders delivered or passed by Civil Courts in any part of the territory of India shall be capable of execution anywhere within that territory according to Law."

The provision in the Constitution of India which is applicable to the State read with the provisions of S. 44 even as this section stood at the time when the execution application was rejected by the executing Court made the decree passed in this case by the Senior Subrodinate Judge of Amritsar executable in the State and the principle enunciated in the abovementioned Privy Council Case could not be invoked.

M. L. Saraf V. Firm Bhagwan Dass Gurdyal. First Appeal No. 32 of 2009 D/-19-1-55, AIR 1955 J&K 5 (H. C.) F. B.

Constitution of India, Art. 19 (1) (f) and (7) (added by the Constitution (Application to Jammu and Kashmir) Order, 1954 — Jammu and Kashmir Right to Prior Purchase Act (1993), Ss. 14 and 15 — Resenableness of restrictiens is not justiciable — Ss. 14 and 15 are not ultra vires.

In the State of Jammu and Kashmir, C1. (7) added to Art. 19 of the Constitution under Para 4 (d) (iii) of the Constitution (Application to Jammu and Kashmir) Order, 1954, specially lays down that C1. (5) of Art. 19 shall be construed as meaning such restrictions as the appropriate Legislature deems reasonable. Hence, if the Legislature has considered the restrictions to be reasonable keeping in view the fact that they are for the benefit of the State of Jammu and Kashmir to examine those restrictions in order to find out whether they are reasonable or not. The Contitution under C1. (7) has itself ousted the jurisdiction of the Courts to examine the reasonableness of the restrictions which have been imposed by appropriate Legislature. The provissons, therefore, of Ss. 14 and 15 of the Right of Prior Purchase Act, 1993, do not contravene Art, 19(1) (f) read with the new C1. (7) added to the Article under paragraph 4 (d) (iii) of the Constitution (Application to Jammu and Kashmir) Order, 1954. AIR 1954 Hyd 161 (FB) — 1953 Punj 20 — AIR 1954 Punj 55, Ref. Anno. AIR Com ; const of India, Art. 19 N. 20 (b) and 65.

Cases *Referred* :- A. AIR 1954 Hyd 161 : ILR(1954) Hyd 85(FB)
B. ,, 1953 Puj20 : ILR (1953) Punj 227
C. ,, 1954 Punj 55 : ILR (1954) Punj 232 (FB)

Golodhu V. Nanak Chand & anr. Civil Revn. No. 91 of 2011 D/-4-4-1955. AIR 1955 J&K 25 (H. C.) F. B.

Constitution of India — Art. 19 (1) (f) and (7) added by the Constitution (Application to J&K) Order 1954—does not render Ss. 14 and 15 of the Right to Prior Purchase Act 1993 ultra vires-reasonableness of restrictions not justiciable.

In the State of Jammu and Kashmir, C1. (7) added to Art. 19 of the Constitution under Para 4 (d) (iii) of the Constitution (Application to Jammu and Kashmir) Order, 1954, specially lays down that C1. (5) of Art. 19 shall be construed as meaning such restrictions as the appropriate Legislature deems reasonable. Hence, if the Legislature has considered the restrictions to be reasonable keeping in view the fact that they are for the benefit of the State of Jammu and Kashmir to examine those restrictions in order to find out whether they are reasonable or not. The Constitution under C1. (7) has itself ousted the jurisdiction of the Courts to examine the reasonableness of the restrictions which have been imposed by

appropriate Legislature, The provisions, therefore, of Ss, 14 and 15 of the Right of Prior Purchase Act, 1993, do not contravene Art. 19(1) (f) read with the new C1. (7) added to the Article under paragraph 4(d) (iii) of the Constitution (Application to Jammu and Kashmir) Order, 1954. AIR 1954 Hyd 161 (FB) — 1953 Punj 20— AIR 1954 Punj 55, Ref. Anno. AIR Com ; Const, of India, Art. 19 N. 20 (b) and 65.

Cases Referred :

A. AIR 1954 Hyd 161 : ILR (1954) Hyd 85 (FB) AIR 1955
B. „ 1953 Punj 20 ILZ (1953) Punj 227
D. „ 1954 Punj 55 : ILR (1954) Punj 232 (FB)

Solodhu V. Nanak Chand & anr. Civil Revn. No. 91 of 2011 D/- 4-4-1955. AIR 1955 J&K 25 (H. C.) F. B.

Constitution of India — Art. 21 — Procedure established by law —vague and indefinite grounds violative of procedure established by — introduction of irrelevant matter vitiates the order of detention as a whole.

Where the grounds supplied to the person detained are vague and indefinite his detention cannot be held to be in accordance with the procedure established by law within the meaning of Art. 21 of the Constitution, and the person detained, is, therefore, entitled to be released.

The grounds supplied to the person detained should show relevancy to the object which the Legislature has in view, namely the prevention of objects prejudicial to the maintenance of law and order. For, introduction of irrelevent matters vitiates the detention order as a whole th ugh there may be only a few grounds that are irrelevant or illusory.

Anno. AIR Com : Const. of India, Art. 21 N. 8 ; AIR 1953 SC 318 & AIR 1954 SC 179 followed.

Cases Referred :-

AIR 1954 All 315 : 1954 Cal Cri LJ 685, AIR 1953 SC 318 : 1953 Cri LJ 1241 (SC), AIR 1954 SC 179 : 1954 Cri LJ 456 (SC).

Gh. Qadir Hawabaz V. State Cr. Misc. Appln. No. 12 of 1955 D/- 27-6-1955 AIR 1955 J&K 35 (H. C.) F. B.

Constitution of India, Art. 21 — Preventive Detention Act (1950), S. 8 — Vague and indefinite grounds supplied — Effect.

Where the grounds supplied to the person detained are vague and indefinite his detention cannot be held to be in accordance with the procedure established by law within the meaning of Art. 21 of the Constitution and the person detained, is, therefore, entitled to be released. AIR 1953 SC 318 Foll. Anno. AIR Com. : Const. of India, Art. 21 N. 8.

Gh. Qadir Hawabas V. State Cr. Misc. Appln. No. 12 of 1655 D/- 17-6-1955. AIR 1955 J&K 35 (H. C.) F, B.

Constitution of India, Art. 21,22 — Grounds of detention — Vagueness — (Public Safety — Preventive Detention Act (1950), S. 7).

It is the right of the petitioner under Art. 22 (5) to be furnished with particulars of the grounds of his detention sufficient to enable him to make a representation which on being considered may give releif to him. The constitutional requirements must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under C1 6 of Art. 22.

Where it has not been done in regard to one of the grounds the petitioner's detention can not be held to be in accordance with the procedure established by law within the meaning of Art. 21

and he is, therefore, entitled to be released. AIR 1954 CS 179, Foll.
Anno. AIR Com ; Const. of India, Art. 21 N. 9 Art. 22 N. 18,20.
Cases Referred :
AIR 1954 SC 179 : 1954 Cri L J 456 (S C)
AIR 1953 SC 318 : 1953 Cri L J 1241 (SC)
Ab. Ghani Goni V. State Cr. Misc. No. 181 of 2011 D/-4-1-1954 AIR 1955 J&K 38 (H. C.) F. B.

Constitution — authority of —

The Constitution by reason of the authority derived from and conferred by the people of India destroyed all vestiges of arbitrary and despotic power in the territories of India and over its citizens and lands and prohibited just such acts of arbitrary power as the State in the present case was seeking to uphold.

The Dominion of India and all those who were invited there sat in the Constituent Assembly not as conquerors and conquered not as those who ceded and as those who absorbed but as the sovereign people of India free democratic equals. Every vestige of sovereignty was abandoned by the Dominion of India. and the States and surrendered to the people of the land who framed the new Constitution of India.

Gh. Rasul V. State Misc. Appln. No. 23 of 1955 D/-27-9-1955 AIR 1956 J&K 17 (H. C.) F. B.

Contitutional development of the State of J&K.

In — 'Virendra Singh V. State of U. P.', AIR 1954 SC 447 (C), it has been held that the Constitution by reason of the authority derived from and conferred by the people of India destroyed all vestiges of arbitrary and despotic power in the territories of India and over its citizens and lands and prohibited just such acts of arbitrary power as the State in the present case was seeking to uphold.

The Dominion of India and all those who were invited there sat in the Constituent Assembly not as conquerors and conquered not as those who ceded and as those who absorbed but as the sovereign people of India free democratic equals. Every vestige of sovereignty was abandoned by the Dominion of India, and the State and surrendered to the people of the land who framed the new Constitution of India.

The position which obtains in the State now is that the tenure of the civil servants of the State is no longer during the pleasure of anyone ever since the Constitution Amendment Act of 2009 has come into force.

Gh. Rasul V. State Misc. Appln. No. 23 of 1955 D/-27-9-1955 AIR 1956 J&K 17 (H. C.) F. B.

Constitution of India, Art. 14—J&K State Evacuees' (Administration of Property) Act (2006), S. 10 (1)—No violation of Art. 14.

Since there is no restriction on cancellation of allotment, under S. 10 (1) the provisions of Art. 14 of the Constitution of India, as applied to the State of Jammu and Kashmir which provides for equality before law and equal protection of laws are not violated
Anno : AIR Com ; Const. of India, Art. 14 N. 1
Gian Kaur & Ors V. PRO & anr Writ Petns. Nos. 255, 289 and 304 of 2011 D/-9-3-1956. AIR 1956 J&K 33 (H. C.) F. B.

Constitution of India — (As applied to Jammu and Kashmir State), Art. 32 (2A) — Other remedy open — Cancellation of allotment under Jammu and Kashmir State Evacuee's (Adminis-

tration of Property) Act (2006) — Remedy under S. 30 A not availed of—Writ Petition whether can be entertained—(Jammu and Kashmir State Evaucees' (Administration of Property) Act (2006), S. 30—A) — (Constitution of India, Art. 226)

The remedy provided in Art. 32 (2A) of the Constitution of India as applied to the State of Jammu and Kashmir cannot be used as a substitute for ordinary remedies. If a statute provides a remedy for a wrong, resort must be had to that remedy.

It is, therefore clear that where there is another remedy open to a party, the High Court should be very reluctant in granting extrordinary remedy by way of a writ but in exceptional circumstances where a party is likely to suffer irreparable loss due to delay which may occur by pursuing the ordinary remedy, the High Court may in extraordinary circumstances grant a speedy remedy by way of a writ. In Jammu and Kashmir State Evacuees' (Administration of Property) Act there is remedy provided under S. 30 A by way of revision to the Custodian General. In face of the remedy provid d under the Act, the High Court will not entertain a writ petition against an order cancelling an allotment except in extraordinary circumstances where the petitioner satisfies the Court that the remedy provided will not be effective and that he will suffer irreparable loss if remedy by way of a writ is not granted. 1953 Pat 112 and 1954 Punj 165 Rel. on. Anno: AIR Com. Const. of India, Art. 226, N. 19(d).

Cases Referred :

AIR 1951 Punj 327 : 53 Pun LR 5. 1954 Punj 165 : ILR (1954) Punj 923, 1954 SC 282 : 1954 SCR 1005. 1952 SC 192 : 1952 SCR 583. 1953 Bom 195 : ILR (1953) Bom 614, 1953 Pat 112 : 32 Pat 131.

Gian Kuar & Ors V. PRO & anr. Writ Petns, Nos. 255, 289 and 304 of 2011 D/-9-3-1956. AIR 1956 J&K 33 (H. C.) F. B.

Constitution of India (as applied to Jammu and Kashmir), Arts. 35 (c) and 13 — Fundamental rights — Curtailment of, with respect to preventive detention in Jammu and Kashmir — (Public Safety — Jammu and Kashmir Preventive Detention Act (2011), S. 3.

Per Wazir, C. J. : The effect of Art. 35 (c) is that the Jammu and Kashmir Preventive Detention Act is excepted from the operation of the fundamental rights. Further, as, the word "modify" used in Art. 370 means to change and to limit, the President has limited the operation of Art. 13 under his powers to modify.

M. Subhan & Ors. V. State Cr. Misc. Applns. Nos. 38 to 40,42,44 to 48 and 51 of 1955 D/-2-8-1955. AIR 1956 J&K 1 (H. C.) F. B.

Constitution of India, Art. 370 (1) (d) — Policy of Art. 370 — Interpretation of "exception" and "modifications".

In order to interpret the words 'exception' and 'modification' as used in sub-cl. (d) of cl. (1) of Art. 370 of the Constitution, the Court cannot derive much help by comparing meanings attached to these words, as used in other provisions of the Constitution. The policy underlying Art. 370 of the Constitution is apparent from the article itself. The very fact that this article begins with the words 'Notwithstanding anything in this Constitution' shows that it is a self-contained provision and has a specific purpose of its

M. Subhan & Ors V. State Cr. Misc. Applns. Nos. 38 to 40, 42 44 to 48 and 51 of 1955 D/-2-8-1955 AIR 1956 J&K 1 (H. C.) F. B.

Constitution of India (as applied to Jammu and Kashmir), Arts.

35 (c) and 370 (1) (d) — Constitution (Application to Jammu and Kashmir), Order (1954) Para 4 (1) (iii) — Jammu and Kashmir Preventivc Detention Act (2011), S. 8 (1) — Art. 35(c) is not ultra vires — S. 8 (1), Jammu and Kashmir Preventive Detention Act is competently enacted.

Clause (c) added to Art. 35 of the Constitution by the President by para. 4 (1) (iii) of the Constitution (Application to Jammu and Kashmir) Order 1954 is not in excess of the powers conferred on the President by Art. 370 (1) (d) of the Constitution of India Hence, the Proviso to cl. (1) of S. 8, Jammu and Kashmir Preventive Detention Act, 2011, by which the Government can withhold grounds on which the order of detention has been made by them from the detenu is within the competence of the Legislature of the Jammu and Kashmir State. AIR 1951 SC 332, Ref.

M. Subhan and Ors V. State, Cr. Misc. Applns. Nos. 38,39,40.42,44, 45,46,47,48 and 51 of 1955 D/- 2-8-1955. AIR 1956 J&K 1 (H. C.) F. B.

Constitution of India, Art. 14 — Natural justice

Violation of the principles of natural justice comes within the purview of Art. 14.

The important principle of natural justice is that a person should not be condemned unheard.

Where a Government servant was demoted on the report of the commission of Inquiry and he did not know whether he was called upon to meet the charges or whether the Commission was functioning as mere a fact finding Commission and he was not apprised of the findings on the basis of which he was punished, there is a clear violation of the princfples of natural justice and the infringement of the fundamental rights which he enjo s under Art. 14, Constitutton of India as applied to the State of Jammu and Kashmir.

Cases Referred :

(1917) — 1917 —1 KB 486. AIR 1951 J&K 1 : 9 J&K LR 180, AIR 1954 SC 447 : 1955 SCR 415 (SC), AIR 1940 PC 230 : ILR (1940 Lah 685 (PC), AIR 1955 SC 425, 1955 SCA 545 (SC), AIR 1950 SC 188 : 1950 SCR 459 (SC)

Ghulam Rasul V. State, Misc. Appln. No. 23 of 1955 D/-27-9-1955 AIR 1956 J&K 17 (H. C.) F. B.

Constitution of India, Arts. 13 and 14 as applied to the State of Jammu and Kashmir) — "Law" — Kashmir Civil Service Rules (1939). Constitute law — AIR 1951 J&K 1 Dissented from

The term 'Law' means rule of conduct enforceable in a Court of Law. In order that a rule should be designated as law it must be established that it has the force of law.

The amendment to S. 4 (1) (b) of Sri Pratap J. and K. Consolidation Act. places the Kashmir Civil Service Rules (1938) on the same footing as existing law enforceable by the State Courts Hence the Kashmir Civil Service Rules (1939) are laws for the purposes of Art. 14 as applied to the State of Jammu and Kashmir AIR 1951 J&K 1 dissented from.

Anno. AIR Com. Const. of India, Art 13 N. 2.

Gulam Rasul V. State, Misc. Appln. No. 23 of 1955 D/-27-9-1155. AIR 1956 J&K 17 (H. C.) F. B.

Constitution of India, Art. 32 (2—A) (as applied to the State of Jammu and Kashmir) — Disputed question of fact — (Constitution of India, Art. 226).

A petition under Art. 32 (2—A) as applied to the State of

Jammu and Kashmir is maintainable where the questions of fact are not so seriously disputed as cannot satisfactorily be determined in the proceedings under Art. 32 (2—A) Anno. AIR Com. Const. of India, Art. 226, N. 7.

Gh. Rasul V. State of J&K, Misc. Appln. No. 23 of 1955 D/-27-9-55 AIR 1956 J&K 17 (H. C.) F. B.

Constitution of India, Art. 32 (2—A) (as applied to the State of Jammu and Kashmir) — Suppression of material facts (Constitution of India, Art. 226).

A petition under Art. 32(2—a) as applied to the State of Jammu and Kashmir is maintainable and cannot be thrown out where there is no deleberate suppression of facts made by the petitioner in his petition.

Anno : AIR Com. Const. of India, Art. 226, N. 21.

Gh. Rasul V. State of J&K. Misc. Appln. No. 23 of 2955 D/-27-9-1955. AIR 1956 J&K 17 (H. C.) F. B.

Constitution of India, Art, 19 (1) (f) — "Property" — Interest of allottee under Jammu and Kashmir State Evacuees' (Administration of Property) Act (2006) is not property — Jammu and Kashmir State Evacuees' (Administration of Property) Act (2006), S. 2 (a)—(Words and Phrases — 'Property').

An allottee under J & K State Evaucees' (Administration of Property) Act (2006) has no insignia or characteristics of proprietary rights vested in him in respect of land allotted to him. Whatever may be the interest of an allottee in the land, it does not constitute 'property' as used in Art. 19 (1) (f) of the Constitution of India. Hence ejectment of an allottee from the land allotted to him would not amount to infringement of his fundamental rights vested in him under Art. 19 (1) (f).

Anno: AIR Com. Const. of India, Art. 19 N. 59.

Gian Kaur & Ors V. PRO & Anr, Writ Petitions. Nos. 255, 289 and 304 of 2011 D/- 9-3-1956. AIR 1956 J&K 33 (H. C.) F. B.

Constitution of India, Art. 32 (2—A) (read with Constituiton of India (Application to Jammu and Kashmir) Order (1954) — Government removing petitioner from Chairmarship of Town Arer Committee — High Court of J&K when will interfere stated — (Constitution of India, Art. 226).

Where the Government has removed the petitioner from certain post i. e ; Chairmanship of Town Area Committee, the High Court of Jammu and Kashmir will assume jurisdiction in such mattets only if an authority which is bound to follow the provisions of a statute acts in contravention of these provisions. But if the Government or such authority acts according to the prodedure provided by the said statute, holds an inquiry as provided by law, and then arrives at some conclusion, High Court of J' and K. will not and cannot interfere on the ground that these conclusions are not warranted by factsr

The High Court of J. rnd K. is not sitting as a Court of Appeal to revise the orders passed by the Govrnment. Not is that Court going to order any inquiry as to whether certain facts alleged on behalf of the Government or the petitiener are right or wrong. The Court will only see if the petitioner has not received equal protection of law.

Anno. AIR Const.of India, Arts. 226 and 32 N.28.

Jawala Prakash V. Sta.e of J&K & anr, Misc. Appln. No. 231 of 2011 D/-21-4-1955. AIR 1956 J&K 32 (H. C.) S. B.

Constitution of India, Art. 370 (1) (d) — "Exceptions" does not

mean mere omissions.

Article 370 of the Constitution gives powers to the President to select certain articles and apply them to the State of Jammu and Kashmir and he may omit the application of other articles. The chief power which vests in the President is to omit certain articles. Having applied some of the articles he may except or modify them. When the President says that he applies a certain article but does not apply certain articles he does not exercise the power of exception which is granted to him but he is exercising the power of omission.

The power of exception is exercised when he applies an article as a whole or as a part excepting a particular thing, a person or a place from its operation. If the power to except meant merely the power to omit an article from application it was not necessary to use that word because the Constitution Assembly simply had to say as it has said that the President may apply such articles as he thinks fit. The use of the word "exc ptions" shows that there was something more which the President could do beyond the power to omit.

M. Subhan & Ors V. State Cr. Misc. Applns. Nos. 38 to 40.42,44 to 48 and 51 of 1955 D/- 2- 8- 1955. AIR 1956 J&K 1 (H. C.) F. B.

Constitution of India (as applied to Jammu and Kashmir), Art. 35 (c) and 370 (1) (d) — Provision of Art. 35 (c) is covered by word "modification" used in Art. 370 (1) (d).

While in general the word "modification" has been interpreted to mean ,tone down, soften rigorous of, assuage or to limit', it has also been interpreted in the sense of enlarging the scope of the previous Act.

And as the essential purpose of Art. 370 is to be ascertained from the article itself rather than by travelling beyond its scope and determining what the policy behind the different provisions of the Constitution contained in its different parts is, the provision contained in cl. (c) added to Art. 35 but the President is covered by the term ,,modification,, as used in Art. 370(1)(d) of the Constitution.

M. Subhan & Ors V. State, Cr. Misc. Applns. Nos. 38 to 40,42.44 to 48 & 51 of 1655 D/- 2 - 8 - 1955. AIR 1956 J&K 1 (H. C.) F. B.

Construction of documents — The document conveyed the lands in consideration of Rs. 350 as perpetual Maurusi tenure (Haq Maurus Dawami) — Transferee given heritable and transferable rights and the transferor debarred from ejecting the transferee in any circumstance — Transferee made liable to pay an annual rent equivalent to the land revenue assessed on the land and two annas in the rupee in addition to the Revenue — Consideration described as Nazrana (premium) and the deed as Bianama Maurus (sale occupancy rights) and the transferee as occupancy tenant (Maurus).

Held that the word Bainama taken with the other terms such as Nazrana and Haq Maurus leads to the conclusion that the deed has been inartistically drawn up and amounts to no more than a transfer by the proprietor of a right to enjoy the property in dispute' The terms of the document clearly fall within the definition of lease.

Gauri Shankar V. S. Gobind Singh, Civil Appeal No. 3 Of 1947 7 J&K LR 224 (Board of Judicial Advisers)

Construction — Document of Transfer containing an indemnity clause — document not registered — requisite previous permission to transfer not obtained — document whether a sale deed and a valid one.

Held that if a document suffers from any legal defect by way of want of registration etc. the nature of that document would not change. All that would happen is that it would not be legally enforcible but what would in other respects be an out and out sale will not because of want of registration or any other defect be come an agreement to sell

Soba & Ors V. Abdulla Joo & an. Civil 2nd appeal No. 61 of 2004. 7 J&K LR 158 (H. C.) Single Bench.

Construction — of judgment — whether real intention of the judge relevant — interpretation put by the author himself or his own judgment — value of,

On a question of construction of the judgment the real intention of the Judge not expressed in the judgment may be irrelevant. It may also be irrelevant if the expressed intention is opposed to the real intention. But where the expressed intention corresponds to the real intention then in such a case, the interpretation put by the author on his own judgment cannot be wholly without value. Anno, Civil P. C. O. 20,R.4 N.7

Raja Sahib of Poonch V. Kirpa Ram, Civil Appeal No. 3 of 1951 D/- 19-8-1952. AIR 1954 J&K 23 (Board of Jud. Advisers).

Contempt of Courts Act (1952), S. 3 — Jammu and Kashmir Constitution Act, S. 69 — Contempt of Court by member of Legislative Assembly.

There is a mis-conception amongst some people dabbling in public affairs in the State of Jammu and Kashmir that writing letters to presiding officers of Courts giving them the writer's view point in a particular case and suggesting to them a particular course to be adopted by Courts is not only no offence, but even falls within the public duties of such people. It has to be pointed out to them that since the earliest history of mankind Courts of Justice have been surrounded by a halo of soleminty. The highest dictates of public policy make it highly desirable and even essential that in the various struggles which are inherent in human society, there should be one institution which can without fear or favour protect the weak and champion the oppressed, and be an arbiter in all disputes between citizen and citizen and also between a citizen and the State. If there exists no such institution in a society, such a society will have no claim to civilization and the governing law of such a society will be simply the law of tke jungle.

A member of a Legislative Assembly is not expected, and should not as a matter of fact take sides in petty squabbles and quarrels that take place amongst illiterate and unsophisticated village folk. What one would expect from such responsible persons is not to fan the fire or internecine quarrels by taking sides, but to attempt at reconciliations and restoration of mutual good relations amongst warring factions and groups.

Cases Referred : (1846) 10 I. Eq. R. 93. (Ir.)
(1806) 13 Ves. Jun. 237 : 33 ER 283
(1903) 1903 — 2 KB 432 : 89 LT 439.

The State V. Nur-ud-Din Sufi, Cr. Misc. Applns. Nos. 1 & 2 of 2011 D/-16-3-1955. AIR 1955 J&K 30 (H. C.) F. B.

Contempt of Court — writing letters to presiding officers of Court giving them the view point of the writer in a particular case

and suggesting a course of action — gross contempt.

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The State V. Nur-ud-Din Sufi, Cr. Misc. Applns. Nos. 1 & 2 *of* 2011 *D/-16-3-1955. AIR 1955 J&K 30 (H. C.) F. B.*

Contract Act (IX of 1977) — Acceptance of tender—Rescission of contract — Damages, Defendant liable to make good the amount paid in excess of the contract rate by the plaintiff.

Tenders for the supply of Latha and Khadar were publically invited to be submitted upto 7th September, 1942 in accordance with the terms printed on the tender forms. Defendant submitted his tender on 7th September, 1942 on the condition that tender will remain open for acceptance upto 15th September 1942. This date for acceptance was extended upto 20th Septemcer 1942. The plaintiff required further quantity of Latha and Khadar and the deferdant made the offer for the supply of this additional quantity on the condition that the plaintiff was to intimate its acceptance before 27th September 1942. The plaintiff also sent a letter of acceptance on 18th July 1942, through a messenger to the defendant who refused to accept it. The defendant accepted the same however on 19th July 1942. The defendants tender was verbally accepted on 17th September 1942. by the plaintiff. The defendant pleaded that he never received the letter of the 18th September and that on his own part before the receipt of the plaintiff's letter of acceptance he sent a letter to the plaintiff on the 18th September withdrawing his offers unconditionally. On appeal the High Court on the whole evidence oral and documentary came to the conclusion that the contract was complete on 19th July 1942 if not on the 18th July 1942 and that according to the defendant's own statement his original tender was definitely accepted by the plaintiff and the defendant's fresh offer of further quantities were accepted by a letter dated 18th July 1942.

Held that in the opinion of the Board the evidence oral

and documentary in support of the binding nature of the contract entered into between parties is sufficient and satisfatory and the Board do not see any reason whatever for disturbing the judgment of the High Court.

Held further that the evidence on the point of quantum of damages is also quite clear and the defendant is liable to make good the amount paid in excess of the contract rate by the plaintiff. I. L. R. 124 Bombay, 96 held not applicable.

Jagdish Cloth House (Defendant - Appelan) Versus, Government (Plaintiff - Respondent) Civil Appeal No. 12 of 1947 - 6 J&K LR page 97 (Board of Judicial Advisers)

Contract Act, 1977 — Contract for the supply of certain type and quantity of willow baskets for two months on certain conditions — Stipulated period expired — Defendant wrote to the plaintiff for preparation of other types of baskets — No quantity fixed — Refusal of the whole quantity got prepared by the plaintiff — Defendant not bound under the terms of the original contract so far as the latter supply was concerned.

Held that the very fact that supplies were made of baskets, though not of the same specification as in the original contract does not show that the supplies made were under that contract. The correspondence that passed between the parties does not in any way prove that a new contract had been entered into with that stipulation that such baskets as were made by the plaintiff were bound to have been accepted by the defendant. There is nothing from which it can be inferred that any fixed quantity was to be taken ever.

Pt. Mukand Kaul V. English Furniture Market Ltd. Civil Appeal No. 10 Of 1949, 8 J&K LR 57 (Board of Judicial Advisers)

Contract Act (1872), S. 65 — Mortgage entered into under mistaken notion of law — Legal formalities not fulfilled — Suit by mortgagor for possession — Applicability of S. 65 — Right of Mortgagee to recover consideration money before restoring possession — (T. P. Act (1882) S. 59.

Where parties enter into a mortgage under a mistaken notion of law without fulfilling the legal formalities which has made the agreement unenforceable at law, and the mortgager brings a suit for possession which had come into the defendadts' possession as a result of the so called mortgage, in such a case S. 65 would apply and the plaintiff would be bound to pay back the consideration received by him, before possession is restored to him. AIR 1936 All. 215 Rel. on. Case Law Ref.

Anno. AIR Man ; Con. Act, S. 65 N. 5,
AIR Com ; T. P. Act, S. 59 N. 15.

Th. Ganpat V. Sukhram. 2nd Appeal No. 92 of 2011 D/- 16- 3- 55. AIR 1955 J&K 20 (H. C.) S. B.

Contract Act (1872), S. 28 — Agreement that suit regarding disputes should be instituted in one only out of two competent Courts — Validity — (Civil) P. C. (1908), S. 9)

An agreement between the parties to a contract to the effect that the suit concerning disputes arising between them on the basis of that contract should be instituted in one only out of two competent Courts having territorial jurisdiction over the subject matter is valid and enforceable and is not void under S. 28. One H of Jammu placed an order with the firm at Bombay for supply of ten boxes of beer and signed the order form in which there was a clause "We agree to the conditions printed on reverse."

Condition No. 5 at the back of this document was "all disputes to be settled in Bombay Courts." The order was placed with the firm at Bombay and Rs. 200/- were advanced to the firm. The firm did not supply the goods in time and there was a breach of the contract on their part and hence plaintiffs filed a suit for the recovry of the amount advanced in the Court at Jammu.

Held that Jammu Court had no jurisdiction to try the suit. AIR 1946 Lah. 57 (FB), Rel. on. Anno. AIR Man ; Contract Act, S. 28 N. 2. AIR Com ; Civil P. C ; S. 9 N. 5 Pt : 7 ; 1953 Mulla, S. 21, P. 129 N. "Waiver.....jurisdiction" (1 Pt. extra in AIR Com.)

Cases Referred :
AIR 1946 Lah. 57 : ILR (1945) Lah. 218 (EB)
T. Motandas & Co. V. L. Hakumat Rai and another, Civil Revn, No. 77 of 2009 D/- 28th Phagan 2009. AIR 1955 J&K 26 (C. H.) D. B.

Contract Act (1872) — S. 28 — Exception I — tort arising as a result of breach in terms of contract — Article applicable for purposes of limitation would be Art. 115 and not Art. 36 —

Article 36 will apply only if the malfeasance etc; is independent of contract. If it is not independent of contract, the Article has no application. A tort may certainly arise independent of contract but it can also arise as a result of a breach in the terms of a contract. Thus where the Government undertook to return the leased property in the same condition in which it was received, with all damage repaired, if such damage was caused by an act of their own neglience or that of their servants and the lease deed also made a provision for reference to arbitration in case of disputes and differences arising between the parties, and the houses leased having caught fire and completely gutted due to wilful negligence of Government servants, the lessor claimed compensation.

Held that the acts complained of were not independent of contract and as such Art. 36 could not be made applicable and the only other Article which would apply would be Art. 115. AIR 1926 Sind 209 and 1929 Sind 55, Dissented from. Chitaley's Limitation Act, p. 1150, rel. on.

Held further that even if Art. 36 were made applicable yet the claim would not be barred in view of S. 28, Exception 1, Contract Act, AIR 1929 Sind 55. Rel on.
Anno. AIR Com. : Lim. Act, Art. 115 N. 3.
AIR Man. : Con. Act. S. 28 N. 5.
Cases Referred :
AIR 1926 Sind 209 : 19 Sind LR 24, AIR 1929 Sind 55 : 107 Ind Cas 435, AIR 1932 Cal 85 : 58 Cal 930. AIR 1958 Mad 480 : 1953-1 Mad LJ 340, (1936) 1936-1 KB 399 : 105 LJ KB 309.
C. Rai V. Union of India, First Appeal No. 46 of 2011 D/- 2-8-1955. (Appeal from the order of Wazir C. J.). AIR 1955 J&K 36 (H. C.) D. B.

Copy of judgment — of the trial court. — necessary to be filed in appeal from appellate decree before the period of limitation or else appeal is time barred.

Held that the agreement that it is not essential to attach a copy of the trial Court's judgment cannot be accepted in view o the express provisions of law under Order 42 Rule I which if different from the law in British India. It is also well known thas the practice is to attach a copy of the judgment of the triatl Court.

Qazi Khalil-ul-rehman V. Atma Ram, Civil 1Ind Appeal No. 1 of 2003, 7 J&K LR 101 (H. C.) D. B.

Corroboration — Approver's evidence — particularly when he retracts his statement subsequently — tainted evidence whether can corroborate.

It is not safe to act upon the approver's statement unless it is corroborated in material particulars and the corroboration should consist of independent evidence. One piece of tainted evidence cannot corroborote another piece of such evidence. While it is true of ordinary accomplice evidence, greater scrutiny and greater corroboration is required in the case of an accomplice evidence which has been subsequently retracted. It is the evidence of a man who is not only immoral in so far as he is a participator in the crime and betrayer of his associate but who is also according to his own showing a patent perjurer. Anno. AIR Com: Cr. P. C. S. 164 N. 18 Pt. 8 N. 19 Pt. 4: S. 337 N. 17 Pt. 4.

Mst Arandatti V. State, Cr. first appeal No. 4 of 2011 D/-22-2-1956. AIR 1955 J&K 13 (H. C.) D. B.

Costs — C. P. C. S. 35 — Successful party — right to receive costs.

Costs awardable under Section 35 are in the discretion of the Courts but that discretion has to be exercised in a judicial manner on the basis of sound legal principles and not arbitrarily. One of such principles is that a successful party is entitled to costs, unless he is guilty of such misconduct as would disentitle him in the eye of law. Even then it is necessary for the trial Judge to record reasons for his not awarding costs to the successful party.

(Note:- In this case the High Court in revision set aside the order passed by the lower Court directing the successful party opposing a pauper application to bear his own costs).

Ghulam Rasul & Ors V. Gh. Qadir & Ors. Civil Rev. No. 52 of 2007 D/- 18th Jeth 2008. AIR 1952 J&K 17 (H. C.) S. B.

Costs — accepted by defendant pursuant to an order allowing amendment of the plaint. Acceptance of the costs whether bars revision against the order of amendment.

Order allowing amendment of plaint on cost—Costs accepted by defendant and plaint amended — Acceptance of costs without prejudice to right to go in revision — Revision against order not barred.

Anno. C. P. C. O. 6, 17, N. 15.

1953 Mulla: O. 6. R. 17, P. 595 N. "Leave.....given" (Topic exhuustively dealt with in N. 15 to 0.6 R. 17, in AIR Com. — 4 Pts. extra in AIR 6om.note).

C. P. C., O. 6. R. 17 N. 21.

Civil P. C., S.115 N. 5.

1953 Mulla: S. 115, P. 410 N. "Interlocutory order" (Lahore view indicated in Mulla is based on over-ruled case in AIR 1924 Lah 425 — Later F. B. case AIR 1943 Lah 55 which over-ruled AIR 1924 Lah 425 not noticed in Mulla — Views of Ajmer - Merwara, Kutch, Mdhya Bharat, Rajasthan and Lahore (subsequent to 1943 Lah 65 (FB) and conflict between Lahore and Allahabad views not noted in Mulla-Solution of conflict not indicated).

Seth Kirpal Chand V. The Traders Bank Ltd Jammu, Civil Revn. No. 49 of 2009, D/- 11-12-53. AIR 1954 J&K 45 (H. C.) S. B.

Court Fees Act (VII of 1977) — Section 7 (v) (b) and (d) — Computation of court-fee payable in suits for possession of land — Expressions "Separate estate" and "Separately assessed"

amplified.

An estate has been considered as separate estate or part of an estate where it is either assessed to land revenue at the time of the settlement and has been recorded as such or where there has been a separate engagement by the proprietor for the payment of the land revenue on that part.

In the Provinces, the provision requires that this recording in the Collector's register must be after the assessment at the time of the settlement and not otherwise.

It is easy enough to ascertain the proportionate amount of the Government revenue on fractional share of a revenue paying estate. But it is not possible to ascertain the proportionate liability of a specific part of an estate for payment of Government revenue, if it is not separately assessed.

47 I. C. 543; AIR 1933 Allahabad 414; AIR 1937 Allahnbad 206 referred to.

Court Fees Act, 1977 — Section 7 Clause (IV) (c) — Suit in which a preliminary decree for partition was issued at Rs. 2,000 — Suit for the declaration of the preliminary decree as null and void valued at Rs. 130 and court fee paid accordingly — Whether the court fee adequate.

Kunj Lal V. Gazi & Ors. Civil Revision (Misc.) No, 109 of 2002 6 J&K LR page 61 (H. C.) S. B.

Court Fees Act, 1977 — Section 7 Clause (IV) (e) — Suit in which a preliminary decree for partition was issued at Rs. 2,000 — Suit for the declaration of the preliminary decree as null and void valued at Rs. 130 and court fee paid accordingly — Whether the court fee adequate

Held that no rules have been framed by the High Court under section 9 of the Suits Valuation Act with reference to the question. The result is that there is no standard of valuation. On the other hand there were some reasons for the plaintiff to put the value for court fees and jurisdiction at the figure mentioned in the plaint. The valuation must, therefore. be accepted.

AIR 1933 Lah. 246, 1941 Lah. 307, 1915 Mad. 948 (F. B.) 1920 Bom. 105, 1918 P. C. 135, 1930 Cal. 686, 1933 Cal. 448, 1939 Nag. 50 (F. B.) 1939 Patna 572 followed. Principle in AIR 1942 Peshawar 4 and PLR J&K 81 not inconsistant with the view in 1943 Cal. 448.

Abdul Rehman Bahadur V. Ahmad Bahadur, Civil Revision No. 39 Of 2003, 7 J&K LR 165 (H. C.) D. B.

(a) Court fees Act (1870) S. 7 (v), Sch. I Art. I — Appeal against the decree for ejectment — Tenancy Laws — (Jammu and Kashmir) State Tenancy Act, Ss. 78, 82.

Where in a suit for ejectment the defendant contests the plaintiff's right to eject and claims compensation for improvement in the event of a decree for ejectment being passed and the Court passes a decree for ejectment subject to the plaintiff paying a lesser amount of compensation than that claimed by the defendant appeals reiterating his claim, the claim to compensation for improvement is merely incidental to the main relief sought against the decree for ejectment and the same court fee is payable in appeal as in the orginal suit Section 82, State Tenancy Act, can have no application to a case in which the Court has awarded compensation under S. 78 of that Act as a condition precedent to the ejectment taking effect and the tenant appeals from the whole decree. It is as much the duty of a Court of appeal as that of the Court of first instance to

determine the amount of compensation payable to a tenant where the tenant prefers an appeal against a decree for ejectment claiming enhanced amount of compensation. The law having made it incumbent upon the Court to award such compensation as the tenant may be found to be entitled to, the claim to compensation must be taken to be ancillary or incidental to the main purpose of the appeal, namely, relief against decree for ejectment passed by the Court of first instance. The applt. is, in any view of the case, entitled to have his appeal heard in so far as it impugned the right of the pltf. to eject when he had paid proper court fees on the relief claimed in the appeal, against the decree of the first Court directing ejectment. AIR (15) 1928 Mad. 929. Rel. on.
Mt: Jani onthers Vs Mandir Sri Bajrang devji. Appeal No. 7 of 1949 D/-30-5-1950. A. I. R. 1951 J&K 10 (Board of Judicial Advisors)

Court Fees Act (1870), S. 12 "Question relating to valuation"

Section 12 relates to cases where the valuation is in dispute and not to those in which the liability to pay the court fee on a certain relief is the principal question involved.
Anno. Court fee Act, S. 12. N. 3.
Mst Jani & Ors Vs Mandir Sri Bagrangdevji — Appeal No. 7 of 1949 D/- 30-5-1950. AIR 1951 J&K 10 (Board of Judicial Advisers)

Court-fees Act (1870), S. 7(v) (b), (d) —Suits Valuation Act (1887), Ss. 3, 9—Rnles under, R. 1 Cls. (a), (c)—Pre-emption suit for portion of estate—Applicability of Cls. (b) and (d) of S. 7(v)—Valuation for jurisdiction.

Possessory or pre-emptive suit for a portion of an estate can come under C1; (b) of S 7 (v) only if it is either a definite share of an estate or a part of the estate which is separately assessed to revenue and it can attract Rule 11, Rules and Orders, Kashmir (Special Laws, Vol. III) under which remission is granted only if it is a factional share of a part of Khewat which has been separately assessed to revenue. All other cases must fail under C1. (d). For purposes of jurisdiction the latter class of suits fall under C1. (c) of R. 1 of the Rules made under the Suits Valuation Act and not under C1. (a). Case Law discussed.
Prithi Singh & Ors V. Milkha Singh & Ors. Givil Revn. Nos. 82 and 83 of 2004, decided by the High Court on 5-6-1951. AIR (38) 1951 J&K 18 (H C.) D. B.

Court—fees Act (1870),S. 13—Remand under inherent powers—Refund of Court fees—(Civil P. C. (1968) O. 41, R. 23 and S.151).

Where the lower appellate court finds that the suit was decided on insufficient material and therefore under its inherent powers remands the case for fresh trial the Appellate Court should order the refund of the Court Fees to the plaintiff appellant. AIR 1939 Lah 257, Rel on.
Anno. Court fees Act, S. 13 N. 3; Civil P. C. S. 151 N. 41 R. 23 N. 33.
Mohd Yusuf & Ors V. Jamal Baba & Ors. Civil Revn. No. 28 of 2009 D/—23-10-1952. AIR 1953 J&K 24 (H. C.) C.J.

Court-fees Act (1870),S. 12-Appellate Court can decide the category of suit and hold that it has no jurisdiction to entertain appeal and return the appeal for presentation to proper Court—(Suits Valuation Act (1887), S.8.)

Where in the trial Court objection was raised as to the insufficiency of court-fee, but the objection was overruled and the suit was dismissed on merits, and on appeal the same objection as

to insufficiency of court - fee was raised and the appellate Court decided that the suit fell under S. 7 (x) (a) and not under S. 8 (v) (b) and further held that as under S. 8, Suit Valuation Act, the value determinable for the computation of court-fees and the value for purposes of jurisdiction was the same, the value for purposes of jurisdiction in the suit was Rs. 600/- and as that Court could hear appeals from the Court of a Munsiff only where the value of original suit, in which a decree or order was made, did not exceed Rs. 500/- it had no jurisdiction to try the appeal and, therefore, returned it for presentation to the competent Court ;

Held that the appellate Court was right in deciding whether it had jurisdiction to hear the appeal and in doing so it had necessarily to decide valuation both for purposes of court-fee and jurisdiction, and that therefore its order returning the appaal for presentation to proper Court was proper. AIR 1928 Lan 635 : 1925 Pat 488, Relied on. Anno. Court - fees Act, S. 12 N. 8, 7 : Suits Valuation Act, S. 8, N. 1, 2.

Cases Referred :

AIR 1929 All 552 : ILR 1939 All 557, 1923 Cal 405 : 71 Ind Cas 1014, 1951 Mad 886 (2) : 64 Mad. LW 462, 1952 Pat 290. 1953 J&K 13 : 11 J&K LR 107, 1925 Pat 488 : 90 Ind Cas 321, 1928 Lah 635 : 111 Ind Cas 72.

Lassi Ganai, V. Mohd Allayi & Ors. Civil Revn. No. 27 of 2008 D/-24-6-1954. AIR 1954 J&K 57 (H. C.) D. B.

Court fees Act (1870) S. 12 — Powers of appellate Court.

The question under what category a suit or appeal falls for purposes of court-fees does not come within the purview of S. 12. But the non-applicability of teis section does not mean that an appellate Court cann t decide the question under what particular provision of the Court-fees Act a suit fails and demand additional court-fee if, as a result of the change of the catetory of a suit, additional fee becomes necessary.

Anno. Court-fees Act, S. 12 N. 1.

Lassi G-anai V. Mohd Allayi & Ors Civil Revn. No. 27 of 2003 D/-24-6-54. A I R J&K 57 (H. C.)D. B.

Court-fees Act (1870), S. 7 (iv) (f), Sch. 1 Art. 1—Suit for accounts — Appeal.

Section 7 (iv) (f) applies to suit where the dispute relates to a right to taking of accounts and does not apply to appeal wnere a decree for a definite amount is prayed for or is challenged. When a plaintiff brings a suit for accounts he cannot know what the result of the accounts is likely to be and, therefore, under S. 7 (.v) (f) he has a right to place his own value on the relief. claimed but this right to place his own value on the releif is limited to cases where the relief sought is one for accounts. But an appeal arising from such a suit may not fall under S. 7 (iv) (f), Court-fees Act.

There may be a final decree passed for a definite amount against one of the parties and the appeal from such a decree will not be governed by S. 7 (iv) (f). There the appellant if he wants to get rid of the decretal amount, will have to pay ad valorem court-fee. The dispute in appeal would no longer be of taking of accounts but would relate to a definite sum of money which is decreed against the appellant. The provision of the Court-fees Act applicable in such a case would be the lst Article of the lst Schedule of the Court-fees Act under which ad valorem Court-fee on the

decretal amount will have to be paid by the appellant as he wants the appellate Court to set aside that decree. Case law discussed.
Anno: AIR Com. Court-fees Act, S. 7 (iv) (f) N. 1, 2, 6, 7; Sch. 1 Art. 1 N. 12,
Cases Referred:
AIR 1954 Trav—Co, 43, AIR 1941 Bom 242: ILR (1941) Bom 477, AIR 1929 Cal 815: 57 Cal 463, AIR 1938 Mad 435: ILR (1938) Mad 598 (FB)
Khem Raj V. Hem Raj and anr, 2nd Appeal No. 79 of 1955 D/-12-3-1956. AIR 1956 J&K 35 (H. C.) D. B.

Counter claim and set off—difference between

Set off and counter-claim are both cross-actions but a set off is also a ground of defence. On the other hand counter-claim is really a weapon of offence and enables a defendant to enforce a claim against the plaintiff as effectively as in an independent action. The main purpose of allowing a defendant to set up a counter-claim is to avoid multiplicity of proceedings between the parties.
AIR 1932 Bom 617, Rel. on Anno. AIR Com C. P. C; O. 8, R. 6 N. 15. 1953 Mulla: O. 8, R. 6. P. 634 N. "Counter-claim" (4 Pts. extra in AIR Com. — Calcutta, Patna and Bombay case Law and AIR 1933 PC 29 not referred in Mulla).
Ghulum V. Gh. Ahmed & Ors 2nd Appeal No. 130 of 2011 D-5-1-1956. AIR 1956 J&K 33 (H.C.)S.B.

Criminal Procedure Code (Act XXIII of 1980) Section 108—A, para (a) — Prohibitory order issued not to enter the Chenani Jagir territory — The word "enter" explained — Whether being found on P. W. D road sitting in a motor lorry passing through the Chenani Jagir amounts to entry into the Chenani Jagir territory.

The term "enter" should be construed along with the words immediately following i. e; "reside or remain." These words provide the clue to the meaning of the word "enter". A reasonable interpretation of the term "enter" obviously would be that the entry must be for the purposes of remaining or residing and not only the physical act connected by the dictionary meaning of the word.

The term "enter" occurring in para (a) of section 108 — A cannot be construed in the light of the Explanation to section 442 of the Ranbir Panal Code.

In the absence of the prosecution proving to the contrary the fact, that the road was under the management and control of the Public Works Department of His Hishness' Government was sufficient to give rise to the presumption that it belonging to the Jammu and Kashmir State and not to the Jagir of Chenani. The fact of it being situate within the boundarias of the Chenani Jagir would not make much of a difference in the case of a public high-way.
Jagan Nath V. State, Revision Cases No. 70 and 71 of 2003, 6 J&K LR Page 31 (H. C.) S. B.

Criminal Proccdure Code (Act XXIII of 1989) — Section 491 — Power of High Court to issue dircctions of the nature of habeas corpus — Persons detained under an order under section 3, Public Security Act, 2003.

Detention under an execution order of the nature under section 3, Public Security Act, 2003, is different from an arrest and detention for the investigation of a crime. If the Government or

police want an investigation, they must proceed in accordance with the provisions of the Criminal Procedure Code. If they do otherwise and took resort of the provisions of Public Security Act for the purposes of investigation, it is fraud upon the Act and their action is not taken in good faith.
AIR 1945 Nagpur 8 referred to.

Where situation arises which lends itself to the construction that the action of the Police is an attempt to supersede the order of the Magistrate, Courts of justice must be vigilant to see that the justice is not brought into ridicule and rendered impotent.
AIR 1948 Bombay 417 referred to.

Devi Saran V. State, Cr. Misc. No. 92 of 2005, 7 J&K LR Page 46 (H.C.) S. B.

Criminal Procedure Code (Act XXIII of 1989) — Section 497 (5) and 498 — Accused released on bail by the Additional District Magistrate — Later on case transferred to another Magistrate who ordered the re-arrest of the accused on the application of the prosecution on the plea that the accused were tampering with the witnesses etc. — Order of the Magistrate without jurisdiction and cannot be upheld on the plea of exercise of inherent powers.

Held that if the prosecution is of the opinion that the accused are misbehaving and mis-using their liberty the remedy available is to move the High Court or the Court of Session for the cancellation of the bail of the accused.

As regards the Courts below the Sessions Court, this power of cancelling the bail and ordering re-arrest can be exercised only by the Court which has ordered the release of the accused on bail. The word 'itself' in subsection (5) of section 497 means a Magistrate who has initially ordered the release of the accused on bail.

Inherent powers of a Court cannot be invoked on a point where the Code has made an express provision. Moreover, there should be no resort to inherent power when there are other remedies available.

Hardatt Raina V. Tej Ram, Cr. Misc. Appeal No. 90 Of 2005, 7 J&K LR. 56, (H. C.) Single Bench.

Criminal Procedure Code (Act XXIII of 1989) — Section 464 — Procedure in case of accused being lunatic — Magistrate noting that the accused was not of unsound mind on the basis of the correct answers given to the questions put to him. — Under these circumstances order for medical examination under section 464 contrary to the provisions of that section.

Held that the Magistrate can order the medical examination of the accused under section 464 Criminal Procedure Code only when he has made up his mind as regards the unsoundness of the mind of the accused. It is only after the Magistrate finds that there are reasons to believe that the accused is of unsound mind that he can order his medical examination.

Obviously a lunatic cannot be forced to pay for medical examination nor any other accused if there be one arraigned along with the lunatic.

Des Raj V. Makhan, CR, Revision No. 28 Of 2005, 7 J & K LR 64 (H. C.) S. B.

Criminal Procedure Code (Act XXIII of 1989) — Sections 476 and 476 — B read with Articles 154 and 155 of Limitatim Act (IX of 1995 — Appeal — Time for limitation runs froon

the date of filing of complaint.

Held that where an application under section 476 asking the Court to make a complaint is refused, time runs from the date of the order of refusal. But this is no so where an order is made directing a complaint to be filed. There time runs not from the date of the order, but from the date when the complaint is actually made. This follows the wording of section 476 to 476—B. The latter section gives the right of appeal when the complaint "has been made". AIR 1929 Cal.521 referred to.

Lakhmi Nath & Anr. V. State, Lakhmi Naih V. State, Janki Nath V. State Cr. Appeals No. 40 of 2003 and Nos. 6 and 7 of 2004, 7 J&K LR 94 (H. C.) D. B.

Criminal Procedure Code (Act XXIII of 1989) — Section 476 — Appeal — Competent from the order of the single judge to the Division Bench

Held that the expression "subordinate" is not to be understood in the sense in which it is used under section 115 of the Civil Procedure Code or in the case of a Court under the Superintendence of a High Court. Section 476-B specially provides that the word "subordinate" is to be read as "within the meaning of section 195 sub-section (3)" This section has been amended, among other things. by the insertion of the words "appealable decrees". The result is that a single judge of the High Court is subordinate to a Division Bench on the ground that appeals in appealable decrees lie from the single judge to the Division Bench.

Lakhmi Nath & Anr. V. State, Lakhmi Nath V. State, Janki Nath V. State, Cr. Appeals No. 40 Of 2003 & Nos. 6 & 7 of 2004, 7 of 2004, 7 J&K LR 95 (H. C.) D. B.

Criminal Procedure Code (Act XXIII of 1980) — Section 162— Use of statements of Police in evidence — Special Tribunal appointed under Command Order to go into the allegations against the accused under the Public Servants' Inquiries Act (XXIII of 1977) — An officer was nominated to investigate and conduct the cases handed over to the Special Tribunal — Subsequent criminal proceedings started against the accused — The accused not entitled to get a copy of the statement made by a witness during the investigation conducted by the aforesaid officers under section 162 of the Cr. P. C.

Held that in order to bring the statement of a witness within the purview of section 162 of Cr. P. C. it has to be shown that the statement was recorded in the course of an investigation under Chapter XIV of the Cr. P. C.

State V. R. B. Pt. Ram Chandra Kak, Ex. Prime Minister, Cr. Reference No. 12 of 2005, 7 J&K LR 195 (H. C.) S. B.

Criminal Procedure Code (Act XXIII of 1989) — Section 423—Accused convicted under section 457 RPC and sentenced — Appeal to Sessions Judge — After the filing of appeal record destroyed in the lower court—Sessions Judge dismissed appeal without perusing record.

Held that under the present circumstances the only course which the learned Sessions Judge should have followed was to order a re-trial. The provisions of Section 423 (1) Criminal Procedure Code are mandatory. According to section 422 Criminal Procedure Code if the appellate Court does not dismiss the appeal summarily, it shall give notice to the appellant and to such officer as the Government may appoint in this behalf. According to section 423 (1) Criminal Procedure Code the appellate Court shall then send for

the record of the case if such record is not already in the Court, and after perusing such record, pass an order according to law. The learned Sessions Judge had not dismissed the appeal, summarily but had sent for the record of the case. Under these circumstances it was incumbent upon him to peruse such record.
AIR 1943 Mad 391(2) referred to.
Rehman Mochi V. State, Criminal Revision No. 10 of 2006, 8 J&K LR 137 (H. C.) S. B.

Criminal Procedure Code (Act XXIII of 1989) — Chapter XXXI — Judgment in appeal — Separate judgment in separate appeal — Accused a bad character subject to police surveillance, convicted in seven cases under section 188 Ranbir Penal Code for having remained absent on various dates from his residence contrary to the order of the District Superintendent of Police — Accused referred seven separate appeals against the seven convictions recorded in seven different trials. The Seseions Judge in appeal dealt with these seven cases by three judgments.

Held that the procedure adopted by the learned Sessions Judge in writing consolidated judgments in cases which are separate and wherein trials have also been conducted separately, is not at all proper. This practice is neither warranted by law nor by any considerations of convenience. Such type of judgments far from contributing to speedy disposal of cases take a lot of time in trying together facts in the labyrinthine mess in which the appeals are cast by adopting such a procedure. In case of every separate trial, separate judgment should be passed.
AIR 1920 All. 79; 1928 Cal. 230 referred to.
Ahad Dar V. State, Criminal Revision No. 40 of of 2006, 8 J&K LR 177 (H. C.) Single Bench.

Criminal Procedure Code (Act XXXIII of 1989) — Section 342 — Statement of accused — Whether such a statement can be considered against a co-accused if it is a confessional statement

Held that a confessional statement recorded under Sectinn 342 Griminal Procedure Code cannot be considered under section 30 of the Evidence Act,1977, against a co-accused in the same trial. The meaning given to the phrase "is proved" as it occurs in section 30,Evidence Act, 1977, is that the confession to be proved must have existed before the trial has begun i.e. must have been recorded before the trial of the case commenced.
A.I,R 1923 All.322,A.I.R.,,1931 Mad.920,A.I.R.1933 Oudh 86,A.I.R 1940 Nag.287, A.I.R 1940 Cal.250,A.I.R 1935 Lah 32, referred to and followad.A.I.R. 1936 Lah. 337,A.I.R. 1930 Bom.324,A.I.R 1937 Sind 182, distinguished and not followed.
Mala Mohamadoo, Gulla Mir, Hasan Nauwai Versus State. Criminal First Appeals Nos 38, 44 and 45 of 2006. 9 J&K LR I (H. C.) D. B.

Criminal Procedure Code (Act XXIII of 1989) Section 157 — Omission to send report of the cognizable offence by the investigating police officer to the Magistrate.

Held that if there is something irregular in the investigation started by the investigating officer, that will not in any way vitiate trial of the accused that is conducted by a duly constituted tribunal.
Ghulam Nabi Bazaz & Others Versus State. Criminal Revision No. 28 of 2006. 9 J&K LR 18 (H. C) Single Bench.

Criminal Procedure Code (Act XXIII of 1989) — Section 491

— Habeus Corpus petition — A married woman detained in a refugee camp in the State who expressed her firm resolve to reside with her husband in the State — Habeus Corpus petition filed by her husband — No law in the State to authorise the Camp Officer of a refugee Camp to detain a person in the Camp against the will of such person.

Held that in the absence of any law in the State, a Camp Officer of a Refugee Camp cannot detain a person against the will of such person in a camp established in the State for the reception and restorotion of abducted persons and it is no argument that the detained person is very well looked after in the camp.

The abducted persons Recovery and Restoration Act, 1949, passed by the Indian Legislature is not applicable to the Jammu and Kashmir State and, therefore, detention of a person in a camp in the State cannot be hald justified under the provisions of that Act.

Mst. Barkati Versus State, Criminal Miscellaneous Petition No. 99 Of 2006, 9 J&K LR 14.

Criminal Procedure Code (Act XXIII of 1989) — Section 156 (2) Investigation of a Cognizable offence by a police officer not in charge of a police - station whether irregularity vitiated trial.

Sub-section (2) of section 156 Criminal Procedure Code lays down that "no proceedings of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate. "As a matter of fact a convictton or an acquittal does not depend upon the question as to which particular officer actually conducted the investigation which resulted in the trial. That is to be determined mainly on the basis of the evidence that is tendered at the trial. A trial cannot be impunged on the ground of such an irrigularity. A. I. R. 1931 Patna 151, A. I. R. 1928 Bom. 162 and A. I. R. 1944 P. C. 73 referred to.

Ghulam Nabi Bazaz & Others Versus State Criminal Revisio6 No. 28 2006. 9 J&K LR 18 (H. C) Single Bench.

Criminal P. C. (1898) S. 526 (1) (a) — Fair and impartial trial not possible — Confinement of one accused for absence of another.

The mere fact that the Magistrate thought that one of the accused persons was responsible for the absence of some other accused, would in no way justify the action of the Magistrate in having placed him in judicial lock up, on the contrary the Magistrate ought to have realised that depriving people of their liberty in such an unceremonious manner is nothing short of unlawful imprisonment. No provision of law exists anywhere by which a Magistrate can confine a person for the absence of another man. Anxiety to secure a speedy trial does not justify the use of such methods. The mere fact that the other accused appeared before the Court on the subsequent day of the arrest and confinement of the accused would not make the illegal act legal and shall certainly create a strong and a reasonable apprehension in the mind of the accused that a fair and impartial trial or inquiry cannot be had before the Court in which the trial is pending. Chitaly's Criminal P. C. (Page 2907) cited with approval.

Rasul Dar & anr. V. Mst Jani, Cr. transfer Appln. Nos. 16 and 17 of 2008. AIR 1952 J&K 1 (H. C.) S. B.

Criminal P. C. (1898) — S. 561 A—Applicability to procsedings under Ordinance VIII (8) of 2006 — Oridinance (VIII (8) of 2006) S. 9.

Section 561—A Criminal P. C. is not contrary to any of the

provisions of Ordinance No. VIII of 2006 and as such it can apply to the proceedings taken in Special Magistrate's Court when the facts of the case warrant its application.

Anno. Cr. P. C. S. 561—A. N. 1.

JN Kaul V. State, Cr. Misc. Appln. No. 14 of 2008 D/- 20 Bhadon 2008, AIR 1952 J&K 2 (H. C,) D. B.

Criminal P. C. (1898), S. 497 — Granting bail in non - bailable offences — principles — Duty of police to put up accused for trial as early as possible pointed out.

It is true that the granting of bail in a non-bailable offence is a concession allowed to an accused person and it presuposes that this privilege is not abused. Coming into contact with the prosecution witnesses and exerting undue influence over them will certainly be sufficient for not granting them bail or for cancelling the bail. But at the same time it should be duty of a Court to see that an accused is not locked up or hampered in his defence simply on the ground that an allegation was made against him that he was tampering with the evidence. The general policy of law is to allow bail, rather than to refuse bail. The Law presumes an accused person to be innocent till his guilt is proved, and as presumably inn cent person he is entitled to every freedom to look after his own case. Extension of concession of bail to an accused gives him better opportunity of looking after his case. But he will certainly lose his privilege in case he misbehaves.

In case in which death has taken place, a speedy investigation is always called for and such cases should be produced before Courts without any unnecessary loss of time. If investigation are left pending before the police for a long time, the possibility of the witnesses forgetting important facts or their being won over by the other side or the danger of some important evidence being lost cannot be excluded. The accused persons should not be allowed to continue in police custody for an unlimited period of time simply because the police does not produce the challan in time.

Anno : Cr. P. C. S. 497 N. 4 7.

Sant Ram & Ors V. State Cr Misc. Appln. No. 106 of 2008, D/- 4-1-1952, AIR 1952 J&K 28 (H. C.) S. B.

Criminal P. C. (1998) S. 403 — Prosecution under Ordinance VIII (8) of 2006 — Discharge — Fresh prosecution — Sanction — (Jammu & Kashmir) Ordinance VIII (8) of 2006.

One J was prosecuted along with some other accused persons in the Court of Magistrate Srinagar for offences under Ss. 3 and 4 of Ordinance No. VIII of 2006 and Sec. 409 R. P. C. The prosecution was launched on 30th Sawan, 2007. The Magistrate accepted the request of the prosecuting Sub-Inspector to withdraw the case against J, and an order of discharge was passed in favour of J.

Held that if J. was to be proceeded against under the provisions of the Ordinance after his discharge, he could not be proceeded against in the same proceedings. A fresh prosecution was absolutely necessary. J. having once been discharged, a fresh prosecution was necessary, but for such fresh prosecution, sanction from the Revenue Minister was necessary. AIR 1936 Cal. 356 Rel. on.

J. N. Kaul V. State, Cr. Misc. Appln. No. 14 of 200k decided on 20 Bhadoon 2008. AIR 1952 J&K 2 (H. C. D. B.

Criminal P. C. (1898) S. 350 (1) — Case retransferred to original Magistrate.

Where a case is transferred from one Magistrate to another but before the latter has recorded the evidence, the case is retransferred to the original Magistrate, the accused cannot ask for a 'de

novo' trial before the original Magistrate as that Magistrate is not "another Magistrate" as contemplated by the Section. AIR 1941 Lah 322 Rel. on. AIR 1934 Mad. 475) AIR 1926 Nag. 220) not foll.
Isher Singh & Ors V. Mt. Nirmal Kaur, Case No. 48 of 2008 D/- 5-10-1951. AIR 1952 J&K 13 (H. C.) C. J.

Criminal P. C. (1898), S. 561A — To prevent abuse of the process of Court.

Where a prosecution has been started in the subordinate Court on a complaint in respect of the offence of cheating but the facts disclosed in the case merely show that it is a case of breach of contract which can be redressed in civil Court, the High Court would, in exercise of its inherent powers under S. 561A. Criminal P. C; quash the proceedings in order to prevent the abuse of the process of the Court. AIR 1938 Mad. 129, Foll.
Anno. Cr. P. C. S. 561A N. 4.
Amir Chand V. Lok. Nath, Cr. Misc. Appln. No. 99 of 2008, D/- 10- 1- 1952. AIR 1952 J&K 26 (H. C.) S. B.

Criminal P. C. (1898), Ss. 263 (g) and 342 — Summary Trial —— Examination of accused if obligatory — Non-compliance —— Effect.

The provisions of S. 342 are mandatory and the procedure of examining the accused so as to enable him to explain any circumstances appearing against him has to be followed even in summary trials.

Hence where in a summary trial the accused has been convicted on his own plea without his being examined under S. 342 and the record has not been prepared according to law, the conviction cannot be sustained.
AIR 1951 All. 410, Rel. on.
Anno. Cr. P. C. S. 263. N. 6 : S. 342 N. 3.
Gh. Mohd. V. Municipal Committee Sgr. Cr. Ref. No. 63 of 2007. D/- 19 Jeth 2008. AIR 1952 J&K 21 (Board of Jud. Advisers)

Criminal P. C. (1898), S. 497 — Application for cancellation of bail — Proof of fact that witnesses are being intimated by accused — Evidence that can be tested by cross - examination must be tendered and not affidavit — Criminal P. C. (1898) Ss. 74, 526, 539 A.

There are only three sections in the Criminal P. C. namely Ss. 74, 526 and 539A according to which a fact may be got proved by an affidavit. It follows from this that an affidavit not convered by these sections is not legal evidence. In an application for cancellation of bail the fact the witnesses were intimidated by the accused persons ought to be proved by such evidence as can be tested on the touch stone of cross-examination and not by affidavit.
Anno. Cr. P. C. S. 497 N. 7
Sant Ram & Ors. V. State, Cr. Misc. Appln. No. 106 of 2008 D/- 4- 1- 1952. AIR 1952 J&K 28 (H. C.) S. B.

Criminal P. C. (1898), Ss. 164, 364 and 533 — J. and K. General Criminal Rules, Ch. XII R. 10 Non-compliance with provisions of Ss. 164 and 364 and of instructions under R. 10 — Irregularity is of substance and not curable uuder S. 533.

Where the confessional statements are not recoreded in the matter required by Ss. 164 and 364 Cr. P. C; there is no "Memorandum of Enquiry" entered before the statements were recorded as required by R. 10 of Ch. XII, General Criminal Rules, the statements are recorded in a narrative and the questions put to the accused and the answers given by them have not been entered

and the memorandum containing the requisite certificate at the end of the statement under S. 164 is not recorded, the defects are defects of substance and not being formal defects are not curable under S. 533, Cr. P. C. The defects render the statements inadmissiable in evidence and even extrinsic evidence of the Mag. that he had complied with such requirement does not remedy the defect. AIR 1937 Nag. 220, Rel. on. 1939 Rang. 219 referred. Anno. Cr. P. C. 164, N. 39; S. 364, N. 10: S. 533, N. 4, 5.

Atta Mohd V. State, Cr. 1st Appeal No. 55 of 9006, D/- 15 Katik 2007. AIR 1952 J&K 36 (H. C.) D. B.

Criminal P. C. (1898), Ss. 364, 533 — Discovery of axe and statement of accused that he committed murder with it — No question put to accused about discovery or his statement in examination under S. 364 — Magistrate cannot use the discovery and the statement in convicting accused.

Anno. Cri. P. C! S. 364, N. 10; S. 533. N. 4.

Evidence Act (1872). S. 27 — Accused in police custody — Statement by, leading to discovery of an axe — Accused further stating that he killed deceased with the axe — Portion of the statement only leading to discovery of axe is admissible — Statement as to killing is not admissible. AIR 1947 PC. 67, Rel. on: Case law referred.

Anno. Evi. Act, S. 27, N. 7, Pt. 3.

Atta Mohd V. State, Cr. 1st apreal No. 55 of 2006. D/- 15 Katik 2007, AIR 1952 J&K 36 (H. C.) D. B.

Criminal P. C. (1998), S. 342 — Confessional statement recorded under — Use of, against co-accused (Evidence Act (1872), S. 30).

A confessional statement of an accused recorded under S. 342 Criminal P. C; cannot be used against his co-accused in the same trial, as the expression 'is proved' in S. 30, Evidence Act, means that the confession to be proved must have **exis**ed before the trial i. e. must have been recorded before the commencement of the trial: AIR 1923 All. 322. 1931 Mad. 820, 1933 Oudh 86. 1940 Nag. 287. 1940 Cal. 250 rel. on, AIR 1936 Lah. 337, Dissent. Anno. Criminal P. C. S. 342, N. 27. Evidence Act, S. 30, N. 1.

Malla Mohammadoo & Ors. V. State, Cr. 1st appeals No. 39, 44 and 45 of 2006, D/- 23- Har 2007, AIR 1952 J&K 49 (H. C.) D. B.

Criminal P. C. (1891), S. 164 — Retracted confession — Evidentiary value.

It is not illegal to base conviction on a retracted confession but the rules of prudence require that a retracted confession must be corroborated by independent evidence connecting the accused with the crime.

Anno. Cr. P. C. S. 164 N. 18 Pt. 1.

Samad Malik V. State, Cr. 1st appeal No. 8 of 2009 D/- 9 Assuj 2009. AIR 1953 J&K 1 (H. C.) D. B.

Criminal P. C. (1898) S. 157 —

Failure to send report to Magistrate — Amounts to serious breach of duty on part of police officer — Does not vitiate trial if there is no prejudice to accused — (Criminal P. C. (1898), S. 537) AIR 1931 Pat. 150 Ref.

Anno. Cr. P. C; S. 157 N. 6; S. 537 N. 14.

Gh. Nabi & Ors V. State, Cr Revn. No. 28 of 2006 D/- 9 Maghar 2006. AIR 1953 J&K 4 (H. C.) S. B.

Criminal P. C. (1898) Ss. 156, 537 — Investigation by inferior officer — Defect curable under S. 537 — Trial not vitiated.

As a matter of fact a conviction or an acquittal does not depend upon the question as to which particular officer actually conducted the investigation which resulted in the trial. That is to be determined mainly on the basis of the evidence that is tendered at the trial. Therefore an irregularity occasioned by a Sub-Inspector investigating into an offence instead of an Inspector, is curable by S. 537 Cr. P. C. and does not by itself vitiate the trial. AIR 1928 Bom. 162 and 1931 Pat. 150 Rel. on. 1944 PC 73 Ref.

Anno. Cr. P. C ; S. 156 N. 4. S. 537 N. 14.

Gh. Nabi & Ors V. State, Cr. Revn. No. 28 of 2006 D/- 9 Maghar 2006. AIR 1953 J&K 4 (H. C.) S. B.

Criminal P. C. (1898), S. 488 (1) — "Child unable to maintain itself."

The word "child" in S. 488 (1) means the son or the daughter without reference to the age. The deciding consideration is whether the child is or is not able to maintain himself or herself. AIR 1951 Cal 66 foll. 1932 Rang 94 ; 1950 Mad 394, Not foll.

Anno. Cr. P. C ; S. 488 N. 10 Pt. 2.

Bk. Nonihal V. Mst Ram Lubhai, Cr Revn. No. 55 of 2009 D/- 23-10-2009. AIR 1953 J&K 16 (H. C.) C. J.

Criminal P. C. (1898), S. 491 — 'Illegally or improperly detained" — (Public Safety — (Jammu and Kashmir Defence Rules (1996 S), R. 24 (1) and (2) — (Constitution of India (1950), Art. 226).

Any order passed by the District Magistrate for the detention of any person, beyond his jurisdiction, under R. 24 (1) and (2), Jammu and Kashmir Defence Rules, is ultra vires of the powers delegated to him by the Government in Council Order No. 281-C, of 1942. AIR 1949 Bom. 37. Rel. on.

Anno. Criminal P. C ; S. 491 N. 7.

Dina Nath V. State, Cr Misc. Appln. No. 72 of 2009, D/- 31 Bhadon 2009. AIR 1953 J&K 18 (H. C.) S. B.

Criminal trial — Courts below approaching the case from the point of view of balancing the probabilities of the prosecution and the defence versions and hold that prosecution version more probable — not a correct approach — distinction between the standard of proof in criminal and civil cases pointed to —

A perusal of the judgments of the Courts below, however, reveals that those courts seriously misdirected themselves in one respect. Those Courts approched the consideration of the case from a point of view which was appropriate for adjudiciation of a civil matter, but wholly inapplicale to a case in which a public servant was charged with the offence of accepting illegal gratifications. What the Courts below virtually did was to compare the probability or otherwise of the respective stories for the prosecution and for the defence, and holding that the story for the prosecution was more probable and convincing, recorded the order of conviction. In other words the Courts below put the evidence for the prosecution in one scale and the evidence for the defence in another and, after weighing the same, held that the scale containing the prosecution evidence was heavier and, accordingly convicted the appellant It is hardly necessary to observe that in criminal cases, unlike civil cases, the evidence has not to be weighed in this manner. In a criminal trial, an accused starts with presumption of innocence in his favour, and this presumption holds the field till the prosecution succeeds in establishing the guilt of the accused beyond all reasonable doubt. Unlike civil cases, the burden that rests on the prose-

cution in criminal cases does not shift from time to time, however flimsy or unreliable the evidence for the defence may be.
Badri Nath V. State, Cr appeal No. 1 of 1952 D/- 18-8-1952. AIR 1953 J&K 42 (Board of Judical Advisers).

Criminal P. C. (1828), S. 367 — Appreciation of evidence — (Evidence Act (1872), S. 1)

The evidence of the chemical examiner as to the presence of human blood stains on the clothes of the accused at the time of his arrest is of little value when there is delay in despatching the clothes to the Chemical Examiner and there is absence of evidence that the articles were sealed and despatched in the presence of the accused and respectable witnesses: 1 J&K LR 37, Rel. on. Anno. Cr. P. C. ,S. 367 N. 6: Evi. Act, S 1 N. 12.
Ab. Salam V. State, Cr. 1st appeal No. 29 of 2007 D/- 10-4-1952 AIR 1954 J&K 1 (H. C.) D. B.

Criminal P. C. (1898), S. 287 — Statement of accused before committing Magistrate, value of

A statement of accused before the committing Magistrate is certainly entitled to greater weight than a mere confessional statement and can be read as evedence under S. 287. But while this is so such a statement has to fall or stand upon its own inirinsic merit. If the story disclosed by it can be accepted as true and worthy of reliance, it can upon but not otherwise.If such a statement has beon found to be be acted tutored by police and retracted in Sessions Court,no conviction can be based upon it.
Anno. Cr.p.C.S.287 N.1.
Abdul Salam V, State, Cr 1st appeal No. 29 of 2007 D/- 10-4-1951. AIR 1954 J&K 1 (H. C.) D. B.

Criminal P. C. (1898), S. 509 — Scope — (High Court Rules and Order — Jammu and Kashmir General Criminal Rules, Ch. 22, R. 3).

Chapter 22, R.3, General Criminal Rules is a mandatory provision that a certificate in the prescribed form should be appended to the medical evidence recorded by the Magistrate. The certificate should state that the presence of the accused who had an opportunity of cross-examining the witness; that the deposition was explained to the accused and was attested by the Magistrate in the presence of the accused. If the Magistrate recording the evidence of the medical witness doesnot append the certificate in the prescribed form that evidence cannot be transferred under S. 509, Criminal P. C. 9 All 720; 10 All 174 and 18 Cal. 129. Rel. on. AIR 1933 Lah 131, Distinguished
Anno. Cr. P. C ; S. 509 N. 1, 4.
Isher Dass V. State, Case No. 18 of 2008 D/- Maghar 2007. AIR 1954 J&K 19 (H. C.) D. B.

Criminal P. C. (1898), Ss. 263 and 264 — Offence chargeable under S. 112 read with Ss. 3. and 83, Motor Vehicles Act..

Magistrate failing to frame record according to provisions of Ss. 263 and 264 — Sentence not passed according to law — Conviction under Ss. 16 and 124, Motor Vehicles Regulation no longer in force — Conviction and sentence quashed — (Kashmir Motor Vehicles Act (12 of 1998), Ss. 3, 83 and 112).
Anno. Cr. P. C ; S. 263 N. 4. Pt. 6.
Gh. Hassan V. State, Cr Ref. No 66 of 2010 D/- 6-8-1953; AIR 1954 J&K 30 (H. C.) S. B.

Criminal P. C. (1898) S. 353 — When his personal attendance is dispensed with : (Cr. P. C. (1898) S. 205 — AIR 1945 Nag 334 Dissented from

Power of trial Court to grant exemption from personal appearance. AIR 1951 All. 864 (FB) and 1947 Mad 433, Followed : 1949 Nag 334, Dissented from.
Anno. Criminal P. C ; S. 205 N. 4 (See also N. 3 Pt 8).
1953 Mitra ; S. 205, P. 874 N. 689 "Scope of section" and 1949 Mitra ; S. 353 P. 1102 N. "When ..... with".
Mst Savitri V. L. Shiv Nath, Cr Ref No. 179 of 2010 D/- 31-12-1953 AIR 1954 J&K 40 (H. C.) D. B.

Criminal P. C. (1898) S. 367 — Cirumstantial evidence (Evidence Act (1872), S. 3).

Circumstantial evidence is as good as direcr evidence with this difference that the circumstances proved against an accused must be such as exclude all inference but that of the guilt of the accused. But, if there is a missing link or that a circumstance is susceptible of another explanation favourable to the accused, such a circumstance cannot be treated as evidence against the accused.
Anno. Cr. P. C ; S. 367 N. 6 Pt. 29 ; Evid. Act, S. 3 N. 6
Ali Shah V. State, Cr 1st appeal No. 16 of 2010 D/- 29-3-1954. AIR 1954 J&K 42 (H. C.) D. B.

Criminal P. C. (1898), S. 236 —

Accused charged of offence under S. 302, Penal Code—Accused acquitted of that offence — Still accused can be convicted under S. 201, Penal Code — AIR 1931 Pat 172, Rel on.
Anno. Cr, P. C ; S. 236 N. 6 Pts. 1 and 2.
Ali Shah V. State, Cr 1st appeal No. 16 of 2010 D/- 29-3-54. AIR 1954 J&K 42 (H. C.) D. B.

Criminai P. C. (1898), S. 488 — Valid divorce — Right of wife to claim maintenance — (Muhammadan Law — Talak — Talak-ul-bidat) — AIR 1930 Bom 178, Dissented from

A valid divorce of the wife by the husband, where in it is sanctioned by personal law, puts an end to the marital relation and the status of husband and wife and no order for maintenance can be made subsequent to the date of such divorce. The wife is not entitled to maintenance after she comes to know that she has been divorced. Hanafie school recognizes Talak-u-bidat and in view of its being least onerous form the husbands, it is the most privalent form obtained in India. Any change in this respect cannot be brought about by the Judicial interpretation. Talak-ul-bidat comes into operation at on ceand is irrevocable right from the moment of its pronouncement or of the execution of the deed if the Talak is in writing.

Tilak in bidat form had been pronounced by the husband in the presence of two attesting witnesses on 12th Katik 2009 and it was sent to the wife under a registered cover addressed to her. though she refused to take delivery of it. The fact that she had been divorced came to the knowledge of the wife before she put in her application under S. 488, Cr. P. C.

Held that on the date when the wife put in her application under S. 488, Cr. P. C. she was no longer the wife of the husband and she was not competent to file an application under S. 488, Cr. P. C ; demanding maintence from a person who was no longer her husband. No maintence could be allowed even for the period of Iddat. AIR 1930 Bom. 178, Dissented from.
Chittaleys' Criminal P. C. cited with approval.
Anno. AIR Com ; Cr. P. C. S. 488 N. 8.
Cases Referred : (A) AIR 1930 B om 178, 81 Cr. LJ 110, (B) 1944 Mad 227, 45 Cr. LJ 672, (C) 1932 PC 25 : 135 Ind Cas. 762 (PC) (D) (78) 4 Cal 588, (E) 1927 PC 15 : 5 Bang 18 (PC), (F) ('09)

36 Cal 184 : 1 Ind Cas 740, (G) ('10) 33 Mad 22 : 3 Ind Cas 730, (H) 1939 Sind 179 : 40 Cri. LJ 814.

Amad Giri V. Mst Begha, Cr. Ref. No. 221/2011 D/- 7- 3- 1955. AIR 1955 J&K I (H. C.) S. B.

Criminal P. C. (1898), S. 494 — Consent of Court — Record of reasons is not essential.

It is nowhere stated in S. 494 that the reasons must be recorded by the Court giving its consent. It is not therefore essential for the trial Court to record its reasons for giving the consent to the withdrawal of the prosecution under S. 494, Criminal P.C; though it may be desirable to do so. Failure to record the reasons, is not an illegality and would not of itself be sufficient to vitiate the order. The High Court of course can interfere with an order of the Court under S. 494, Criminal P. C ; if the applicant succeeds in showing that the trial Court has exercised its discretion in an extermely high-handed or arbitrary manner.

Anno. AIR Com ; Cri. P. C ; S. 494 N. 5 : 1954 Mitra, S. 494 P. 1948 N. "Record of reasons" (Different views not clearly brought out in Mitra).

Partap Chand V. L. Behari Lal & Ors. Cr. Misc. No. 259 of 2010 D/- 11-2-1955. AIR 1955 J&K 12 (H. C.) D. B,

Criminal P. C. (1898), S. 494 — Withdrawal of prosecution by Public Prosecutor without consulting privpte complainant — Legality.

A Public Prosecutor can intervene in a criminal case instituted on a private complaint. The Public Prosecutor who has taken charge of the case instituted on a private complaint can withdraw the prosecution without consulting the complainant. AIR 1924 All 203, Distinguished.

Anno. AIR Com : Criminal P. C : S. 494 N. 2 ; 1954 Mitra, S. 494 P.1948 "Who.....Prosecution" (one Pt. extra in Mitra) AIR Com., Criminal P. C., S.494 N. 3: 1954 Mitra, S. 494 P.1944 N. 1808 " withdrawal from prosecution".

Cases Referred :

A. AIR 1948 Mad 422 : 49 Cri LJ 540, B. AIR 1924 Pat 283 : 25 Cri LJ 446, C AIR 1938 Nag 76 : LJ 65, D. AIR 1933 Sind 367 : 35 Cri LJ 142, E, AIR 1932 Cal 699 : 34 Cri LJ 433, F. AIR 1924 All 203 : 25 Cri LJ 970, G. AIR 1931 Cl 607 : 33 Cri LJ 3.

Partap Chand V. L. Behari Lal & Ors. Cr. Misc. No. 259 of 2010 D/- 11-2-1955. AIR 1955 J&K 12 (H. C.) D. B.

Criminal P. C. (1898), Ss. 337 and 164 — Approver's statement — Corroboration — (Evidenoe Act (1872), Ss. 114, Illustration (b) and 133).

It is not safe to act upon the approver's statement unless it is corroborated in material particulars and the c rroboration should consist of independent evidence. One piece of tainted evidence cannot corroborate another piece of such evidence. While it is true of ordinary accomplice evidence, greater scrutiny and greater corroboration is required in the case of an accomplice evidence which has been subsequently retracted. It is the evidence of a man who is not only immoral in so far as he is a participator in the crime and betrayer of his associate but who is also according to his own showing a patent perjurer.

Anno. AIR Com : Cr. P. C. S. 164 N. 18 Pt. 8 N. 19 Pt. 4 : S. 337 N. 17 Pt. 4.

Mst Arandatti V. State, Cr 1st appeal No. 4 of 2011 D/-22-2-55. AIR 1955 J&K 13 (H. C.) D. B.

Criminal P. C. (1898), S. 164 — Confession immediately after police custody — (Evidence Act (1872), S. 26)

Where the accused was sent to the Magistrate direct from the police custody and after the statement she was again returned to the police custody as he was to be taken by the police to the maternity hospital for being delivered and she was then expecting child-birth at any moment, a confessional statement recorded in such circumstances loses much of its value and cannot be deemed to have been entirely free from police pressure.

Anno. AIR Com. Cr. P. C. S. 164 N. 17 Pt. 8. AIR Man Evi. Act, S. 26 N. 4.

Mst Arandatti V. State, Cr. 1st appeal No. 4 of 2011 D/-22-5-55. AIR 1955 J&K 13 (H. C.) D. B.

Criminal P. C. (1898), S. 342 — "Question him generally on the case".

Every error of omission not in complaince with the provisions of S. 342, Criminal P C. does not vitiate a trial and the question whether the trial is vitiated in each case depends upon the degree of the error and the prejudice it may have caused to the accused AIR 1953 SC 76, Followed.

It is a binding principle of law that an accused person must be afforded an opportunity to explain any circumstances which might appear against him after recording the prosecution evidence.

In the instant case the accused were examined and opportunity as aforesaid was given to them after the prosecution evidence was recorded by a question being put to them in the following terms: "Have you heard the prosecution evidence that has been led against you? Do you want to give any further statement?" The accused stated in reply "I have heard the prosecution evidence. I have given a detailed statement on 12-3-2009. I do not want to give any further statement." It was contended that the questions put to the accused were defective in form and did not cover the point unfolded by the prosecution evidence against the accused and for which an opportunity should have been afforded to them to offer an explanation.

Held that there was force in that submission but not to the extent of holding that the trial itself was vitiated theseby. It would have been much preferable if the questions were in a more detailed form, but the questions and answers recorded in the case were not so general in form as to held that any prejudice had been caused to the accused.

AIR 1953 SC 76, Rel. on. AIR 1927 Lah 720, Distinguishd.

Anno. AIR Com; Cr. P. C; S. 342 N. 15.

Girdhari Singh & Ors V. The State, Cr. 2nd appeal No. 44/2011. AIR 1955 J&K 22 (H. C.) S. B.

Criminal P. C. (1898), S. 109 — Giving satisfactory account of himself — What amounts to.

To give a satisfactory account of himself is entirely different from being unable to give a satisfactory explanation of his conduct on a particular occasion. A person walking on a public Highway, though somewhat very late in the evening, cannot be called to furnish an explanation for his remaining out at a later hour, unless it be shown that his conduct was so unnatural or suspicious as would justify seeking an explanation.

Even though the accused may have had bad antecedents that would not justify harrassing him on the basis of a mere suspicion will verging upon a mere conjucture or even a whim. It should be borne in mind that a person after he has served his sentence must be given a respite to reform himself and that unnecessary harassment would simply tend to convert such a person into a hardened criminal who would then become a greater danger to society.

Anno : AIR Com. : Cr. P. C., S. 109 N. 9 : 1953 Mitra P. 242 N. 246, "Within.....jurisdiction" and P. 242 "Cannot.....himself" Pt. in N. 9 of S. 109 in AIR Con. extra).

Samad Guru V. The State, Cr. Revn. No. 78 of 2011 D/- 17-2-55. AIR 1955 J&K 28 (H. C,) S. B.

Criminal P. C. (1898), S. 109 'Concealing his presence' — Merely running away on seeing police does not amount to.

There is no presumption in law or commonsense that a person who runs away when he sees a police does so "with a view to commit an offence". Where therefore, the evidence only shows that a person alleged to be previously convicted. merely tried and to run away to avoid observation by police officers at 11 O' clock at night, it does not mean that he was trying to conceal his presence with a view to commit an offence.

Anno : AIR Com : Cr. P. C ; S. 109 N. 59 136 ; iMtra, S. 109 P. 243 N "Concealing.....offence" (on the question whether concealment should be continuous Mitra does not notice the views of other High Courts).

AIR Com. : Cr. P. C ; S. 109 N. 7 ; 1953 Mitra, S. 102 P. 243 N "Concealing..... offence".

Samad Guru V. The State, Cr. Revn. No. 78 of 2011 D/- 17-2-55. AIR 1955 J&K 28 (H. C. S. B.

Criminal Trial — Burden of proof of guilt of eccused — always on prosecution — Benefit of doubt to the accused.

In a criminal case the standard of proof is not the same as in a civil case. If there is doubt. the benefit must go to the accused. The burden of proof is always on the prosecution to prove beyond doubt that the accused is guilty. If the defence is a counter version, for instance, a plea of alibi and if that version is not proved, it does necessarily follow that the prosecution case must be accepted. If there is some evidence in support of the defence version which throws some doubt on the prosecution version, conviction cannot be justified.

Yaseen V. State, Cr. First Appeal No. 37 of 2003 — 6 J&K LR page — 6 (H. C.) D. B.

Criminal Trial — Confession of an accused — Court may not accept it in its entirety and it can even vary and modify it.

A Court is not bound to accept the confession of an accused in its entirety ; and it can disregard any portion of that statement which it considers unreliable and it can even vary and modify that statement by adding its own inferences provided these inferences are based upon some legal evidence in the case.

Sain Shah V. State, Cr. Appeal No. 3 of 1947 — 6 J&K LR page 45 (Boaad of Judicial Advisers)

Criminal trial — statements of prosecution witnesses recorded before committing magistrate brought on record during trial before the Sessions Judge on the ground of delay in the production of witnesses — not cross - examined — Admissibility.

Held that, however, unfortunate the result may be the Board

are unable to agree with the contention pressed upon them that such evidence should be discarded. In the strict legal view there is hardly any flaw. The accused had an opportunity to cross-examine but did not do so. All the conditions laid down by section 33, Evidence Act, being present, that fact alone will not make the evidence inadmissible.

Qadir Gujar V. State, Cr. Appeal No. 2 of 1947 — 6 J&K LR page 87 (Board of Judicial Advisers).

Criminal trial — plea of guilty in a prosecution under S. 16 of Motor Vehicle Act (1 of 1955) to avoid waste of time — sentence of fine Re. 1 — no evidence led regarding over loading by the prosecution — duty of the Court to ascertain quantum of overloading. Whether obligatory upon a court to record a conviction on plea of guilty even though false and unconvincing.

Held that it is not obligatory upon a Court to record a conviction on an unconvincing and false plea of guilty. Besides, in recordnig a conviction under the Motor Vehicles Act for over-loading it was necessary to ascertain what was the over-load. If the driver was carrying in the lorry, alongwith its prescribed quota of passengers and goods, a mercot in the shape of a pet rabbit. it would be over-loading technically but it would be the height of officiousness to challan such a case and certainly quite undesirable to record conviction.

State V, Dharam Singh, Cr. Referenceed No. 146 of 2003, 7 J&K LR 33 (H. C.) Single Bench.

Criminal Trial — Murder — Discretion to award sentence — How to be exercised.

Held that the sentence no doubt, is in the discretion of the Sessions Judge. but he has to exercise that discretion in accordance with the well-known judicial principles and not quite arbitrarily in volent disregard os these principles.

Atta Mohammad Versus State. State Versus Ghulam Mohd. State Versus Ghulam Mohd And Other. Criminal First Appeal No. of 2006. Criminal Reference No. 10 of 2006. Criminal Revision No. 58 of 2007. 9 J&K LR (H. C) 137 D. B.

Criminal Trial : Proof of murder — Most of prosecution witnesses gave straight forward account of the occurrence as it had been narrated in the First Information Report — The accused appellant did not adduce any evidence in his defence — Both the trial court and the High Court believed the evidence for the prosecutiou — The tone of one of the prosecution witnesses lent support to the suggestion that he had been won over — His statement in the Court of Sessions contained many facts in extenuation of the guilt of the appellant — The Statement of this witness in the Committing Magistrate's Court was tendered as evidence by the prosecution under section 288 Criminal Prodedure Code — The statement was the same as that of the complainant in all material particulars.

Held on careful consideration of the entire evidence in the case and of the arguments advanced by the learned advocate for the accused — appellant. The Board saw no reason to differ from the conclusions arrived at by both the Courts below and that the Board were satisfied that the appellant had been rightly convicted for the offence of murder.

Gian Chand Versus State. Criminal Appeal No. 1 of 1950. 9 J&K LR 157 (Board).

Criminal Trial :- Proof of murder — The accused, on the night of occurrence was sleeping in the courtyard of the family house — In

close proximity to the court yard the deceased, his wife and his minor children were sleeping in a Deorhi — It was admitted that on the night in question, at about 10 P. M. the deceased's throat was cut with a sharp-edged weapon and his death was instantaneous — The wife of the deceased was half asleep and she got up by the thumping sound of the stroke that was administered on the throat of the deceased and she saw the accused with a sword in his hand — She raised a hue and cry that the accused had murdered her husband — The neighbours then immediately came to the spot — The fact that she raised a hue and cry and proclaimed that her husband had been murdered by the accused was proved by a number of witnesses whose presence on the spot cannot be doubted and who had absolutely no motive to falsely implicate the accused - appellant — The accused, in the meanwhile, had got inside a rrom and bolted the same from inside — One of the prosecution witnesses persuaded the accused to come out — The accused, however, stayed only for a couple of minutes near the dead body of his brother, denied having committed the murder and again went back to the room — The fact was admitted by the accused in his statement that the accused was at the time of murder in the same house — Apart from this the evidence unanimously showed that the clothes of the accused — appellant were stained with human blood and that a sword stained with human blood was recovered from an earth-bin in the room to which the appellant had retired immediately after the murder — Holding the accused guilty of murder the Sessions Judge sentenced him to death — On appeal the conviction and sentence passed on the appellant was affirmed by the High Court.

Held on a consideration of the evidence in the case that the Board was satisfied that the conclusion arrived at by the Courts below was the only possible conclusion in the case.

Chattar Singh Versus State. Criminal Appeal No. 2 of 1950. 9 J&K LR 175 (Board).

Cr. Trial — Examination of accused — Discovery of weapon of offence from the accused — his statement that he committeed the offence — Neither put to the accused — cannot be used in convicting the accused

Evidence Act (1872), S. 27 — Accused in police custody — Statement by, leading to discovery of an axe — Accused further stating that he killed deceased with the axe — Portion of the statement only leading to discovery of axe is admissible — Statement as to killing is not admissible. AIR 1947 PC. 67, Rel. on: Case law referred.

Anno. Evi. Act, S. 27. N. 7, Pt. 3

Atta Mohd. V. State. Cr. 1st appeal No. 55 of 2006 D/- 15 Katik 2007 AIR 1952 J&K 36 (H. C.) D. B.

Criminal trial — accused not invoking any of the exceptions in justification of the act of commission or ommission with respect to which he is charged — assessment of evidence how to be made.

The prosecution is not releived of the burden of satisfying the judicial conscience of the Court from the evidence led by it about the guilt of the accused. In short, in criminal trials, in which the accused does not invoke to his aid any of the exceptions embodied in a criminal Statute in justification of the Act of commission or omission with respect to which he is charged, the Court is bound to keep the evidence for the

prosecution and for the defence in two water-tight compartments, and has first to consider whether or not the guilt of the accused has been established beyond all reasonable doubt by the prosecution evidence. If the answer to question, just referred to, is in the negative, there is an end of the matter. If, however, the Court is of the opinion that the prosecution discharged the onus that rested upon its shoulders, it has then to turn to the defence evidence in order to find out whether that defence does or does not rebut the prosecution evidence and either negative the guilt of the accused or makes his guilt doubtful, It is true that, in one sense, the evidence, both for the defence, has, at some stage of the case, to be weighed, but it is well that in criminal cases the evidence has not to be weighed in golden scales. and there must be great preponderance of weight on the side of the prosecution before the accused can be found guilty.

Badri Nath V. State, Cr. appeal No. 1 of 1952 D/- 18- 8- 1952. AIR 1953 J&K 42 (Board of Judicial Advisers).

Criminal trial — standard of proof — consideration of improbabilities.

Apart from this. it is impossible in the story given out by Jainti, To begin with she stated that the room being locked, the appellant jumped into the same through an aperture in the wall, and when he committed the crime shrieks were raised not only by Fazi but also by Jainti. It may be, that in the dead of night, those shrieks did not reach the ears of the neighbours, but what is curious that even though Jainti and Ali Mir, according to their statements, were lulled into silence by the threat of being put to death, they unhesitatingly broke their silence on the arrival of Rasul Wani in the village. The story about the removal of the dead body of the appellant single - handed is also a bit curious. Jainti first deposed that the body was taken from the room through the aperture in the wall. She, however, presumably appreciating the absurdity of this portion of her statement, corrected herself, and said that the appellant unbolted the door of the room and took the dead body out and after depositing the dead-body in the courtyard came back to the room and bolted the same from inside and thereafter went out of the room through the aperture in the wall.

Wali Dar V. State, Cr. appeal No. 2 of 1952 D/- 9- 8- 1952. AIR 1953 J&K 44 (Board of Judicial Advisers).

Criminal trial — Common intention — what is —

Common intention means the intention to commit the crime actually commited. It may not be a pre-conceived plan and might come into existence even at the time when the fight ensued.

Four persons went at late hour in the night to the place where the deceased resided. One of them carried a thick stick which could have caused grevious hurt is used more than once. Manner and circumtances in which they were going showed that every one of them was aware that a fight may be necessary consequence of their going in which a hurt of some kind may be the result. Quarrel with deceased developing into hand to hand fight in which beating was administered to deceased. Deceased receiving fatal injury but who gave that injury not known. Accused must be presumed to have a common intention to cause grievous hurt in the circumstances. Accused held guilty under S. 325 and not under S. 304 (ii), Penal Code.

Mehtab Singh V. State, Appeal No. 25 of 2007 D/- 18 Poh 2007. AIR 1954 J&K 17 (H. C.) S. B.

Criminal trial — Recovery of Blood stained clothes — Duty of investigating officer.

The moment the investigating officer recovers bloodstained clothes from rhe accused, he should seal them in the presence of the witnesses and send them on to the Chemical Examiner for analysis.

Ali Shah V. State, Cr. 1st appeal No. 16 of 2010 D/- 29-3-1954. AIR 1954 J&K 42 (H. C.) D. B.

Curable defects — what are —

Held only formal defects in recording confessional statements could be cured under section 533 Cr. P. C. and not the defects of substance.

Atta Mohammad Versus State, State Versus Ghulam Moh'd. State Versus Ghulam Moh'd and others. Criminal First Appeal No. 55 of 2006. Criminal Deference No. 10 of 2006. Crimina/ Revision No. 58 2007. 9 J&K LR 137 (H. C.) D. B.

Custom — Mohammadans in Kashmir—Inheritance—Khana Nishin daughter dying sonless — Another Khana Nishin daughter does not succeed her.

According to the custom as set forth in Sant Ram Dogra's Code of Tribal Customs, if Khana Nishin daughter dies sonless, the inheritance lapses to the agnates of her father and does not go to another Khana Nishin daughter.

Ali Pather & Ors V. Habiz Ganayi & Ors. Civil 2nd Appeal No. 98 of 2303. 6 J&K LR Page 1 (H. C.) D. B.

Custom — Jats of Hiranagar Tehsil — Can a male issueless proprietor alienate his agricultural land without any legal necessity and without the consent of collaterals — Parties Hindus—Custom alleged must be proved — No analogy to be drawn from law as prevailing in the Punjab.

In this State, the authority is furnished by the Sri Pratap Jammu & Kashmir Laws Consolidation Act, 1977, which shows that the ordinary Hindu Law sh ou'd prevail, where the parties are Hindus, unless it is proved that it has been modified by custom applicable to the parties concerned. It is for the plaintiffs to prove the custom specifically. 2 J&K LR 186 (B. J. A.) fo lowed.

Romella & Ors V. Bhagatram & Ors. Civil 2nd Appeal No. 263 of 2003. 6 J&K LR 17 (H. C.) D. B.

Custom — Proof — Elementary requisitions of the proof of custom— No presumptinn that a custom prevalent in one partof the country may be prevalent in another part also.

A custom should be proved to be ancient, uniform and continues. It has been pointed out so many times that the pleading of a custom may not be presumed in every case and that it has to be definitely set forth and pleaded. In cases where a certain customs are very well-known and found to be generally in vogue this rule of pleading may be relaxed. In the District of Kathua the custom of a resident daughter inheriting her father's property in the same manner as a son is not at all in vogue and is never known to have been followed. The term "Dukhtar Khana Nashin" should, therefore, be interpreted in its natural meaning and not in the sense it has been acquired in Kashmir Valley in view of the

custom prevailing there.

Mst. Jevani V. Ramanand, Civil 2nd Appeal No. 22 of 2003, 7 J&K LR 10 (H. C) Single Bench.

Custom — Kashmir Muslim — Succession — Whether an adopted son amongst Muslim agriculturists can succeed to the collaterals of his adoptive father.

Held that the appointment of an heir creates a personal relation only between the parties, i. e. appointer and appointed heir and it does not go beyond that. So far as Kashmir is concerned, the rights of an adopted son with regard to inheritance are discussed in Question 75 (j) and (k) of Sant Ram Dogra's Tribal Custom. In answer to Qu stion 75 (k), the author of theCode states that "the adopted son inherits from the adoptive father". It does not say that an adopted son amongst the Muslim can inherit the property of or succeed to the collateorals of his adoptive father. This makes it abundantly clear that such a custom as gives a right to an adopted son to succeed to the collaterals of his adoptive father is not conceived by the Code of Tribal Custom. Put nonetheless, it is open for a person to urge a custom which may not have been recorded in the Code of Tribal Custom.

Ahad & Anr. V. Samad & Ors. Civil IInd Appeal No. 162 of 2004. 7 J&K LR 184 (H. C.) D. B.

Custom — Adoption among Mohammadan in Kashmir Valley — Pisar Parwarda Appellant set up adoption which he failed to prove — Had also set up an alternative case on the basis of a deed — Whether when the apecific adoption set up by the appellant had broken down, it was open to him to rely upon another adopticn by a deed alone at a different time and circumstances.

Held that if the declaration of adoption in the deed by its own force could confer upon the appellant the status of an adopted son, the mere fact that appellant has set up a different adoption which he fail d to prove, would not take away from him the status which arose under the deed and would not disentitle him to claim a releif on the basis of the deed.

Khaiil Bhat & Ors V. Shah Bibi & Anr. Civil Appeal No. 2 of 1949. 8 J&K LR 41 (Board of Judicial Advisers).

Custom — Custom in derogation of personal law—Burden of proof — Sri Pratap Jammu & Kashmir Laws Consolidation Act (IV(4) of 1977, S. 4 — Evidence Act (1972), Ss. 101-103.

A custom supersedes the personal law so far as it is esablished but, as regards matters outside such established custom, the personal law must prevail.

In the absence of proof to the contrary, the presumption is that a person is governed by his or her personal law in matters relating to sucessions, inheritance, marriage, guardianship etc. The very best possible evidence, and that of a high order, is needed to establish the existence of a custom in derogation of the personal law of the parties to a litigation. The more abnormal the custom pleaded, the heavier is the burden on the party alleging the same, and it is not permissible to infer the existence of such a custom simply on the basis of the existence of some other analogous custom which is not in conformity with the personal law of the parties.

Ramzan V. Mt. Khati, Appeal No. 4 of 1950 decided by the Board of Judicial Advisers on 21-6-1950. AIR 1951 J&K 12

Custom — Succession — Muhammadan Law

A custom supersedes the ordinary law so far as it is proved and everything beyond the proved custom must be governed by such law. Where a Muhammadan dies leaving his mother and a brother, their shares according to Muhammadan Law, are; mother 1/6th and brother the remaining 5/6th both taking in absolute right. The Muhammadan Law, however, stands superseded by a custom under which the mother instead of taking 1/6th in absolute right takes the whoie for life and the brother, instead of taking only 5/6th immediately, takes the whole after the termination of the interest of the mother. The life interest becomes vested in the mother and the remainder becomes immediately vested in the brother. The daughters of the brother do not succeed collaterally, but they succeeded to the vested interest which their father possessed and though the latter died in the life-time of the mother his interest does not cease but devolves upon his daughters who became entitled to the share after the termination of the limited interest of the mother. The transferee from the mother having taken transfers of property in which his transfer had only a limited interest cannot be entitled to any payment by the daughters as a condition precedent to a declaration being granted to them. 29 Cal. 828 PC Rel. On.

Ahad Lone V. Mst Azizi. Civil Appeal No. 14 of 1950 D/-1-8-1950. AIR 1952 J&K 11 (Board of Judicial Advisers).

Custum (Kashmir) — Succession — (Muhammadan Law — Custom.)

If a daughter failed to establish a custom under which she claimed as a Dukhtar Khana Nashin nominated by her mother. sbe is entitled to fall back upon Mohammadan Law and claim a share to which that law entitles her unless, of course it is proved that by custom she is excluded by some other heir and that Mohammadan Law has been superseded by such custom to that extent. 8 J&K LR 117 followed.

Mst Safia V. Mst Fatima & Ors. 2nd Appeal No. 29 of 2009 D/-10-3-1953. AIR 1953 J&K 39 (H. C.) D. B.

Customary Law — Suit by reversioners for Declaration before limited owner's death — Effect.

Held that a family custom whereby a Mohammaden sister who succeeds to her brother's estate is subject to be divisted of the same on her marriage by the agnatic heirs of her deceased brother was not proved.

Mst Zooni & Ors V. Salam & Ors. Civil appeal No. 8 of 1948, D/- 26 - 8 - 1952. AIR 1954 J&K 21 (Board of Judicial Adivsers.)

Customary Law Suit by reversioners for declaration before limited owner's death — Effect.

Held that the title of reversioners must depend upon the state of things existing at the limited owener's death and a suit before that time would be an unnecessary and useless litigation of question which may never arise or may only arise in a different form.

Khazir Tantre V. Ahsan Mir & Ors. Civil IInd Appeal No. 162 of 2003. 7 J&K LR 82 (H. C.) D. B.

Customary Law — Kashmir Valley—Mohammadan—Khana Nashin daughter — Whethcr a Khana Nashin daughter is prohibited to inherit from another source or in another capacity.

Held that there is a common mistake made in that the status as a daughter of a female is almost invariably confused with her

status in another capacity. If a female has or has no rights as a daughter it does not have reflection upon her rights in some other capacity namely as a sister or any other relation. In the Code of Tribal Customs by Sant Ram Dogra it is pointed out that daughter inherit only if they are Khana Nashin daughters, otherwise not. This would clinch the matter of the inheritance as a daughter of a female but no further. It is not possible to conceive that if a particular custom prevailing in the vally prevents a female from inheriting property from one source, she should ipso fact be presumed to be prohibited to inherit from another source.

Mst. Amina Begum & anr. V. Ghulam Mohd & Ors. Civil 2nd Appeal No. 24 of 2004. 7 J&K LR 139 (H. C.) S. B.

Customary Law — Kashmir Valley — Mohammadans — Gift to sister's son — Death of donee Mutation effected in the name of the donee's sister's son — Doner's agnatic relations sue for possession of the property on the basis of alleged custom that after the death of donee property reverted to them. — Custom not proved.

Held that the witnesses merely depose to a custom under which if a Khana Damad dies issueless the property which he got from his father-in-law, reverts to the agnates of the latter. Even if such a custom exists, it does not affect the present case. It has been rightly found by the High Court and it is not disputed before the Poard that the donee was the absolute owner of the property gifted to him by the doner. He became a fresh stock of inheritance and doner's heirs have no locus standi after his death. There is no evidence of any custom such as is relied on by the plaintiffs.

Ramzan Ralla V. Alj Bhut. Civil Appeal No. 8 of 1949. 8 J&K LR 90 (Poard of Judicial Advisers).

Cnstomary Law — Parties Mohammadan — Plaintiff nominated by her mother as Dukhtar Khana Nishin — The plaintiff failed to establish a custom under which she claimed as a Dukhtar Khana Nashin — Plaintiff is nevertheless entitled to succeed as a daughter simpliciter.

Held that if the daughter failed to establish a custom under which she claimed as a Dukhtar Khana Nishin nominated by her mother, she is entitled to fall back upon Mohammadan Law and claim a share to which that law entitles her unless, of course, it is proved that by custom she is excluded by some other heir and that Mohammadan Law has been superseded by such custom to that extent.

ILR 29 Cal. 828 PC relied upon S. 4 of the Sri Partap J & K Laws Consolidation Act (IV of 1977) followed.

Lassi Ganai & Ors V. Reshi Mir & Ors. Civil Appeal No. 7 of 1948. 8 J&K LR 117 (Board of Judicial Advisers).

Debt Laws — Distressed Debtor's Relief Act — "Debt" — Money advaneed to Dalal whether is for purposcs of trade.

Trade will not be a trade if the element of buying and selling or bartering or exchanging goods for goods or money is wanting. Therefore, where the main job of a Dalal is to go to the railway station and get goods belonging to various traders releesed and then carry them to the owners and get a commission for this job these functions performed by him do not bring him under the catogory of a trade. It is a personal labour that he indulges in for which he receives wages in the shape of commission. Therefore, sums advanced to him cannot be said to be for the purposes of trade. Hence, a suit to recover any balance of such sums if less than Rs. 5,000 will not lie in a Civil Court.

Suraj Prakash V. Jagdish Mitter, First Appeal No. 26 of 2007, decided by the High Court on 19 Jeth 2008. AIR 1951 J&K 20(H.C.)D.B.

Debt Laws — (J&K) Distressed Debtors' Relief Act — Trade — Meaning — Advance for articles to be supplied is not loan.

The word 'trade' has not been defined in the Distressed Debtors' Releif Act. The only course open therefore is to go to the dictionary meaning of the word 'trade', which is given as buying and selling of commodities. Where, therefore, A agrees to supply B a certain number of bamboo sticks and receives for that purpose a certain advance of money from B, the advance is made for the purpose of trade and hence does not constitute a debt within the meaning of the Act. AIR (32) 1955 All. 277 relied on.

Gulzari Lal V. Karam Chand, Case No, 44 of 2007 decided by the High Cour t on 18- Jeth 2008. AIR 1951 J&K 17 (H. C.) D. B.

Debt Laws — J & K Agriculturists' Relief Act (I of 1938), S. 2 — Burden of proof

What a person who claims the benefit of the Act on the ground that he is an agriculturist has to prove specifically is that he was wholly or principally dependent for his maintenance upon agricultural, horticultural or pastoral pursuits. Claimant not doing so but admitting that long prior to suit he had mortgaged his land and that on date of suit he was in receipt of pension only and not any income from agricultural sources — Held he was not an agriculturist.

Niranjan Nath V. Kailash Kaul & anr. Civil original suit No. 14 AIR 1954 J&K 6 (H. C.) S. B.

Debt Laws — J&K Agriculturists' Relief Act (I of 1938 S.), S. 2 (1), Explanation (a) —

"Temporarily" in no case would mean a number of years.

Niranjan Nath V. Kailas Kaul & anr. Civil original suit No. 14 of 2008 D/- 28-5-1953. AIR 1954 J&K 6 (H. C.) S. B.

Debt Laws — J&K Agriculturists' Relief Act (I of 1938 S.) S. 2 (1), Explanantion (a)

In order to claim the benefit of the explanation, the defendant had to show that he was on the date when the mortgage was executed, "ordinarily engaging himself personally in agricultural labour."

Niranjan Nath V. Kailash Kaul & anr. Civil Original Suit No. 14 of 2008 D/- 28-5-1953. AIR 1954 J&K 6 (H. C.) S. B.

Debt Laws — J&K Agriculturists Relife Act (I of Smt. 1983) S. 11 — mortgage valid — must be enforceable by sale of mortgaged property even though mortgoger agriculturist and the mortgage property lands or houses belong to an agriculturist.

If a mortgage is valfd, it must be enforceable by sale of mortgaged propeity even though the mortgagor be an agriculturist and the mortgage property be lands or houses belonging to an agriculturist.

Where, therefore, with respect to a mortgoge debt, a decree in terms of S. 11, Jammu and Kashmir Agriculturists' Relief Act was drawn, but when on default of more than two instalments the d cree-holder applied under 0.34 R. 4 for a final decree for sale of mortgage property, objection was taken, that it being agricultural land, no decree for sale could be passed.

Held, that S. 60 (1) was no bar in putting the property to sale. AIR 1945 Lah 123 — 1924 All 328 (FB) and 4 J&K LR 150. Relied on. AIR 1941 Pesh 53 and AIR Lah 194, Not followed.

Anno. AIR Com. Civil P. C 0.34. R. 5 N. 5.
Cases Refered :
AIR 1941 Pesh 53 : 194 Ind Cas 716. AIR 1937 Lah 123 : 173 Ind Cas 589. AIR 1945 Lah 123 : ILR (1945) Lah 373 (FB). AIR 1924 All 328 : 46 All 489 (FB) 4 J&K LR 153.
Khem Chand V. Mela Ram & Ors. Civil Org. Suit No. 9 of 1993 D/- 24-3-1955. AIR 1955 J&K 33 (H. C.) S. B.

Debt Laws — Jammu & Kashmir Distressed Debtor's Relief Act (16 (XVI) of 2006), Ss. 18 and 29 — Order of civil Court transferring or refusing to transfer case to Conciliation Board — When open to revision — Test.

Under Section 8 of the Act, any order, right or wrong, which the Court is empowered to pass under the Act, cannot be challenged in revision. If, however, the Order which the Court has passed is in excess of the jurisdiction conferred upon it by the Act, it cannot be one passed under the Act. Such order can be challenged in revision. The test in each case will be whether in passing an order the Court acted within its jurisdiction and this will depend upon the circumstance of each case.

Hence an order of civil Court that a case should or should not be transferred to the conciliation Board under Section 29, even if erroneous will not be open to revision if the Court had jurisdiction to decide the question.

Degambar Sain V. Pt Lachhman Dass Ref. No. 1 of 1951 D/- 18-6-1951. AIR 1952 J&K 7 (Board of Jud. Advisers).

Debt Laws — Jammu and Kashmir Distressed Debtors' Relief Act (16 (XVI) of 2006). S. 29 (1) and (4) — As amended by Act (24 (XXIV) of 2007) — Scope — Suit not relating to debt as defined by Act cannot be transferred to Conciliation Board — 'Distressed debtor', meaning of — word 'amount' in S. 22 (4) if can be construed ejusdem generis with debt — (Interpretation of Statutes)

A suit not relating to debt as contemplated by the Distressed Debtors' Relief Act as amended by Act XXIV of 2007 can be transferred to the Board of Conciliation under S. 29 of the Act.

In substituting the word 'amount' for the word 'debt' in S. 29 (4) of the Act by the Amendment Act (XXIV of 2007) the legislature had some object in view and the object could only be to make S. 29, applicable not only to cases of debts but also to others. One of the recognised canons of construction of a Statute is to interpret it so as to avoid imputing an absurdity to the legislature. To accept the contention that the scope of S. 29, is precisely the same with a new word "amount", as it was before when the word 'debt' occurred therein, will clearly amount to imputing to the legislature a future act which served no legislative purpose.

The term 'Distressed debtor[1] as defined in S. 2 must be taken in relation to each debt due from him and not qua all debts due from him. The term is a relative term and a person is impressed wirh the character of 'distressed debtor" in relation to one or more of the debts due from him but not as regards others which do not fall within the definition.

The amendment made by ACT XXIV of 2007 has recast the whole of Section 29 and Sub-S. (4), as now stands is radically different to the original Sub-S. (4) under S. 29 as amended.

The word ,amount' in Section 29 cannot be construed cejusdem

generis' with the word 'debt' as the word 'amount' does not follow the word 'debt'. Unless there is a genus or category there is no room for the application of the 'enjusdem generis' doctrtne.
Anno. Civil P. C. (Preamble N. 7.
Degambar Sain V/s Lachhman Doss, Civil Reference No. 1 of 1951 D/- 18-6-51, AIR 1952 J&K 7 (Board of Judicial Advisers)
Decree — amendment of—application for amendment made after execution application finally rejected by High Court. Proceeding for its amendment whether to be taken simultaneously.

Application for amendment of decree (which was not in conformity with judgment) made after application for execution of decree was finally rejected by High Court — Procedings for execution of decree and for its amendment held should have been taken simultaneously.
Anno. Civil P. C. S. 152 N. 7 and 8.
Raja Sahib of Poonch V. Kirpa Ram, Civil Appeal No. 3 of 1951 D/- 22-8-1952. AIR 1954 J&K 23 (Board of Judicial Advisers).
Decree — not in conformity with judgment — effect of —

Decree for enjectment by Munsiff subject to payment by landlord of Rs. 720/- to tenant within two months — On appeal District Judge raising amount to Rs. 928/6/- and judgment requiring landlord to pay the said sum before ejecting tenant — Decree however aequiring landlord to pay Rs. 928/6/- within two months before ejecting tenant — There was held discrepancy between judgment and decree of District Judge — Time limit not being fixed in his judgment it could not be imported in it from decree of Munsiff on the ground that the District Judge had allowed the appeal only to a limited extent and for the rest it had affirmed the decree of the Munsiff.
Anno. Civil P. C 0. 20, R. 4 N. 7 ; 0. 20, R. 6 N. 7.
Raja Sahib of Poonch V. Kirpa Ram, Civil appeal No 3 of 1951 D/- 19-8-52. AIR 1954 J&K 23 (Board of Jud. Advisers).
Deed — Construction of — Document of transfer co ntaining an indemnity clause — Requisite previous permission to the transfer not obtained — Document not registered—Document a sale-deed though invalid one.

Held that if a document suffers from any legal defect by way of want of registration etc. the nature of that document would not change. All that would happen is that it would not be legally enforcible but what would in other respects be an out and out sale will not because of want of registration or any other defect become an agreement to sell.
Soba & Ors V. Abdulla Joo & anr. Civil 2nd appeal No. 61 of 2004. 7 J&K LR 158 (H. C.) Single Bench.
(b) Deed — Construction — Entry in Goshwara Register. An entry in a Goshwara Register was to the following effect :

"Mutation is effected in the name of Dharamsal under the management of B with the following condition attached : That produce of the land shall be used for the Langar (free Kitchen). In case is not used for Langar the property shall revert to L or the daughters."

Held that the entry did not evidence any unconditional 'Shankalap' or dedication by L. The effect of the arrangement evidenced by the Goshwara, appeared to be no more than that L constituted B her agent, for the purpose of realising the income of the land and spending it on a particular object, subiect to the cardinal condition that the agency will terminate and possession

of property will revert to the owner, the moment the income was diverted to some other use.

Basant Singh & Ors V/s Makhan Singh & Ors. Civil Appeal No. 6 of 1950 decided by the Board of Judicial Advisers on 14-6-1950. AIR 1951 J&K 6

Deed Sale-deed and a rent note brought into existence during the pendency of criminal prosecution — Formed part of the compromise of the criminal case — Appellant refused execution of the sale-deed before criminal prosecution — Oral evidence given by the appellant in support of his contention that the transaction brought about by undue influence — Concurrent findings of fact arrived at by Courts below regarding the appellant's contention — The plea of illegality of sale deed and the rent-note not raised in Courts below.

Held that on the vital question whether the appellants oral evidence was reliable or unreliable the estimate of the Courts below cannot be questioned. And unless the appellant can be permitted to bring in aid his oral evidence which has been rejected by the Courts below it is not possible for him to displace the findings of fact arrived at by the Courts below.

Further held that it is not necessary to enter into question of the illegality of the sale-deed and the rent note on the ground that their object was to stifle the criminal prosecution. As this plea was not raised in the Courts below and it raises controvertial questions of law and fact and cannot be entertained at this stage of the case.

Ghulam-ud-Din V. H. Abdul Razak Keng. Civil Appeal No. 14 of 1949. 8 J&K LR 75 (Board of Judicial Advisers).

Defence of accused — counterversion — not proved — whether if there is some evidence in support of the defence conviction is maintainable.

In a criminal case the standard of proof is not the same as in a civil case. If there is doubt, the benefit must go to the accused. The burden of proof is always on the prosecution to prove beyond doubt that the accused is guilty. If the defence is a counter version, for instance, a plea of alibi and if that version is not proved, it does not necessarily follow that the prosecution case must be accepted. If there is some evidence in support of the defence version which throws some doubt on the prosecution version, conviction cannot be justified.

Yaseen (Appellant) V. State, Cr. first appeal No. 27 of 2003. 6 J&K LR page 6 (H. C.) D. B.

Defence Rules, 1996 — Rule 59-A — Residential house of the applicant requisitioned by the District Magistrate — Revision potition filed by the High Court — Order of the District Magistrate not revisable.

Held that in this case the District Magistrate has acted not as a District Magistrate subordinate to the High Court, but as a person designata acting under powers specially delegated to him by the Government. As such anything that may be done by the District Magistrate as a person designata and which might contravene any law or directions of the Government to go into and not this Court.

AIR 1947 All. 403; 1947 All. 51 and 1946 Bom. 533 (F. B.) followed.

Chet Ram Kohli V. State Cr. Revision No. 51 of 2006. 8 J&K LR 170 (H. C.) S. B.

Delegation — J&K Public Security Act (15 of 2003), Ss. 3 (2) and 38 — A, the Government can delegate only those powers to an officer or authority which it possesses.

According to S. 38A, Public Safety Act, the Government can delegate only those powers to an officer or authority which it possesses. Neither S. 3 (2) nor any other section of the Act confers any power on the Government to transfer a detenu from one place of custody to another. The committal to custody has in all cases to be made by the officer who has effected or directed the arrest of the detenus, and therefore, the Notification (Annexure to Cabinet Order No. 928C of 1949, D/- 27-11-48) by which powers of transfer are deemed to have been delegated to the Hon'ble Home and Dy. Prime Minister is ultra vires of S. 3(2) and S. 38A of the Act.

Gh. Nabi Jan V. State, Misc. Cr. Case No. 109 of 2010, D/- 28-7-1953. AIR 1954 J&K 7 (H. C.) D. B.

Delegation — Whether Govt. has inherent powers of its own to delegate — Whether Govt. can exercise only those powers delegated to it by the Legislature.

The Government can exercise only those powers which have been delegated to it by the legislature. Governments have no inherent powers of their own. They have to execute the wishes of the legislature which in fact has the sovereign authority. If the legislature does not in specific words authorize the Government to take a certain action against a person who is dealt with under some law, the power to take such action cannot be presumed without a clear provision of law.

Gh. Nabi Jan V. State, Misc. Cr. Case No. 109 of 2010, D/- 28-7-1953, AIR 1954 J&K 7 (H. C.) D. B.

De — Novo Trial.

Where a case is transferred from one Magistrate to another, but before the latter has recorded the evidence, the case is retransferred to the original Magistrate, the accused cannot ask for a 'denovo' trial before the original Magistrate as that Magistrate is not "another Magistrate" as contemplated by the Section. AIR 1941 Lah 322 Rel. on. AIR 1934 Mad 475 AIR 1926 Nag. 220) not foll.

Isher Sing & Ors. V. Mt. Nirmal Kaur, Case No. 48 of 2008 D/- 5-10-1951, AIR 1952 J&K 13 (H. C.) C. J.

Detention — J&K. Preventive Detention Act (2011) S. 4 — Procedure laid down in S. 4 not strictly followed — Detention invalid.

Per Kilam and Shahmiri JJ. (Wazir C. J. contra): Where the detention orders are not served on the detenus in accordance with the procedure established by S. 4, Jammu and Kashmir Preventive Detention Act, 2011, the arrest and detention of the detenus are both improper and invalid. The procedure laid down by law has to be stricktly observed and where deviation from legal procedure is established the detenue is entitled to be set free. AIR 1952 SC 106 and AIR 1954 J&K 59 : Disting : 1955 J&K 7 (FB), Rel. on.

M. Subhan & Ors. V. State, Cr. Misc. Applns. Nos. 28, to 40, 42, 44, 48 & 51 of 1955 D/- 2-8-1955. AIR 1955 J&K 1 (H. C.) F. B.

Detention — J&K Preventive Detention Act (2011) — S. 3 — Order of detention issued not on behalf of Sadar-i-Riyasat — Whether order valid.

The word "superintendence, direction and control" as used in S. 6, Jammu and Kashmir Constitution Act, 1996 involve the exercise of control and the giving of directions. Therefore, the detention orders are not bad, because they have been issued on behalf of the Government and not in the name or on behalf of the Sadar-i-Riaysat.

M. Subhan & Ors. V. State, Cr. Misc. Applns. Nos. 38 to 40, 42, 44, to 48, & 51 of 1955. D/- 2- 8- 1955. AIR 1956 J&K 1 (H. C.) F. B.

Detention — Preventive Detention Act (1950) — S. 7 — Grounds Vague — detention invalid.

It is the right of the petitioner under Art 22 (5) to be furnished with particulars of the grounds of his detention sufficient to enable him to make a representation which on being considered may give relief to him. The constitutional requirements must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under Cl. 6 of Art. 22.

Where it has not been done in regard to one of the grounds, the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of Art. 21 and he is, therefore, entitled to be released. AIR 1954 SC 179, Foll.

Anno. AIR Com ; Const. of India, Art. 21 N. 9 Art. 22 N. 18, 20.

Cases Referred :

AIR 1954 SC 179 ; 1954 Cri. L J 4 456 (SC)
AIR 1953 SC 318 : 1953 Cri. L J 1241 (SC)

Ab. Ghani Goni V. State, Cr. Misc. No. 181 of 2011. D/- 4- 1- 1954 AIR 1955 J&K 38 (H. C.) F. B.

Detention — Preventive Detention Act Act (1950) — S. 8 — Effect of vague and indefinite ground furnished to the detenue — held detention not in accordence with procedure established by law as envisaged in Art. 21 of the Constitution of India.

Where the grounds supplied to the person detained are vague and indefinite his detention cannot be held to be in accordance with the procedure established by law within the meaning of Art. 21 of the Constitution, and the person detained is, therefore, entitled to be released.

The grounds supplied to the persen detained should show relevancy to the object which the Legislature has in view, namely, the prevention of objects prejudicial to the maintainance of law and order. For, introduction of irrelevant matter vitiates the detention order as a whole, though there may be only a few grounds that are irrelevent or illusory.

Anno. AIR Com : Const. of India, Art. 21 N. 8, AIR 1953 SC 318 and AIR 1954 SC 179 followed.

Cases Referred :

AIR 1954 All 315 : 1954 Cal Cri L J 785
AIR 1953 SC 318 : 1953 Cr L J 1241 (SC)
AIR 1954 SC 179 : 1954 Cri L J 456 (SC)

Gh. Qadir Hawabaz V. State, Cr, Misc. Appln. No. 12 of 1955, AIR 1955 J&K 35 (H. C.) F. B.

Detention—Preventive Detention Act (2 of 2011) — (1950). S. 3 — Execution of order of detention — Mode of execution given in the order itself — Failure to follow — Order of detention is bad.

Preventive detention is a aerious inroad on civil liberties and as such any law which in any way curtails civil liberties has to be very strictly construed. The court has to see if the law as it is, has or has not been meticulously followed, and if it finds even a hairbreadth deviation made from the express provisions of law or a slight disregard of any direction given according to law it shall have no hesitation in declaring a detention under such circumstances quite illegal. This shall apply witn greater force in Kashmir as the law there is somewhat different and even a bit harsh when compared to the law in force in the other Indian States. When directions as to the execution of an order of detention are given in the order of detention itself, those directions have to be meticulously followed. Hence, where the order of detention has provided that a notice of the said Order shall be given to the detenu by delivering a copy of this order to him. and no such copy is delivered to him, the order of detention is bad.
Hissam-ud-Din and Ors. V. The State. Cr. Misc. Matters, Habeas Corpus Applns. Nos. 173 to 176 of 2011 — D/- 18-1-1955. AIR 1955 J&K 7 (H. C.) F. B.

Detention — For reasons of security of State — Time Limit for declaration of non-supply of grounds.

Though it is highly undesirable that detenue should remain in suspense, if the mak ng of a declaration with regard to the supply or non-supply of the ground is delayed yet a reference to proviso to S. 8, Preventive Detention Act, would show that no time limit for making a d claration with regard to the non-supply of grounds is provided by this Section or any other section of the Preventive Detention Act. Such being the case, the Government cannot be forced to act in a manner which may be more desirable. but which the law does not make upon it obligatory. Hence where the detention is for reasons of security of State, the mere fact that the declaration as regards non-supply of grounds is made after the application for habeas Corpus is submitted to the High Court does not vitiate the detention.
Hissam-ud-Din & Ors. V/S State, Cr. Misc. Matters, Habeas Corpus Applns. Nos. 173 to 176 of 2011, D/- 18-1-1955, AIR 1955 J&K 7 (H. C.) F. B.

Detention — Preventive Detention Act (1950), S. 19 — Whether contravenes Art. 20 of the Constitution of India.

It is true that Art. 20. Constitution of India forbids the trial and conviction of a person according to a law which was not in force at the time when the offence was committed; but proceedings under the Preventive Detention Act are not judicial proceedings and preventive detention by itself is not a conviction or sentence of imprisonment. Section 19 which is of the nature of an ex-post facto law which has been framed to govern the cases of those detnus who were arrested under earlier laws now repealed and whose remedies available to them then have now been taken away from them, does not, therefore, contravene the provision of Art. 20.
G. A. Ashai V. State, Cr. Misc, Appln. No. 4 of 2010, D/- 22-7-1954, AIR 1954 J&K 59 (H. C.) F. B.

Detention—Under J&K Public Security Act(15 of 2003 as amended by Act 13 of 2010). S. 3 — Power of Government — Whether can revoke a defective order and pass fresh order.

The Government has the right to pass a fresh order of detention, if it comes to the conclusion that the previous order of

detention was defective on any grounds whatsoever and once such a valid order of detention is passed, any irregularities or illegalities of the period prior to the making of the fresh valid order would in no way affect the merits of the result of the case.

Further, if at any time before the Court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid order for detention. AIR 1945 FC 18 and 1252 -SC 106, Rel. on.

Anno. cr.P.C.S.491 N.7.

G. A. Ashai Versus State, Cr. Misc. Appln. No. 4 of 2010 D/- 22- 7- 1954. AIR 1954 J&K 59 (H. C.) F. B.

Detention —— Outside jurisdiction —— J&K Public Security Act (15 of 2003), S. 3 — Whether valid.

An order of detention directing that the detenu be detained at a place beyond the jurisdiction of the detaining authority is illegal as the annexure to Council Order No. 356C of 1947 shows that the power of arrest and detention has to be exercised by a police officer within his own jurisdiction. AIR 1949 Bom 37, Rel. on. Anno. Cr.P.C.,S. 491 N. 7.

Ghulam Nabi Jan V. State, Misc. Cr. Case No. 109 of 2010, D/- 28- 7- 1953. AIR 1954 J&K 7 (H. C.) D. B.

Detention —— Under J&K Public Security Act —— Satisfaction of the arresting authority.

Awavering mind can never be treated as a "mind satisfied which is pre-requisite for passing an order under section 3 of the Public Security Act.

Jagat Ram Aryan V. State, Cr. Misc. appln. No. 32 of 2008. D/- 27- 7- 1951. AIR 1952 J&K 4 (H. C.) S. B.

Detention — Under Public Safety Act (XV of 2003) satisfaction of the arresting authority only and not on the complaint of others.

Held that the Public Security Act specifically provides that the arresting authority should be satisfied that the applicant has acted or is about to act in a manner prejudicial to the public safety or peace before he makes the arrest. The arresting authority cannot make an arrest on the complaint received by him from other persons that the person is acting or is about to act in a manner prejudicial to public safety or peace. The legislature has laid great responsibility on the arresting authority that he should be satisfied before he makes the arrest and not go by what other persons say about the individual whom he is going to arrest.

AIR 1948 All 414 followed.

Onkar Singh V. State, Cr. Misc. No. 93 of 2005, 7 J&K LR 73 (H. C.) S. B.

Detention — Under Public Security Act (XV of 2003) — Applicant released on bail by magistrate —— Police ordering detention ——— Held improper — Detention quashed.

Where a situation arises which lends itself to the construction that the action of the police is an attempt to supersede the order of the magistrate, courts of justice must be vigilant to see that justice is not brought into ridicule and rendered impotent.

AIR 1948 Bam. 418 ref.

Devi Saran V. State, Cr. Misc. No. 92 of 2005, 7 J&K LR 46 (H. C.) Single Bench.

Difference between State Law and Indian Law — C. P. C. (Act X of 1977) 0. 21 (A) Rules 7 and 8.

When a judgment-debtor is arrested or imprisoned in exe-

cution of a decree for money, or against his property an order of attachment has been made in execution of such decree he may apply to be declared an insolvent under the State Law. If the Court is satisfied that the provisions of rule 8 are in his favour, it may declare him to be an insolvent.

The provisions for insolvency proceedings in the State are embodied in Order XXI (A) of the Code of Civil Procedure and they are in some respects different from those of the provincial Insolvency Act in British India. In particular there is no provision in the State Law unlike rhe British India Law that the amount of the debts should be Rs. 500; nor that the debtor shall not be entitled to present an insolvency petition unless he is unable to pay his debts.

A. I. R. 1928 Lahore 202 distinguished I J and K. L. R. 126 referred to.

Raj Mohammad V. Mehta Kanshi Ram & Ors. Civil Misc. Ist. Appeal No. 36 of 2002, 6 J&K LR page 74 (H. C.) D. B.

Dismissal — Distinction between void and wrongful dismissal.

The distinction between a void dismissal and a wrongful dismissal is obvious. In the case of a wrongful dismissal in contravention of a Statute there is no power of dismissal and it is in a way without jurisdiction and consequently void and of no legal effect and the dismissed servant still continues in service. On the other hand in the case of a wrongful dismissal in contravention of the rules there is no actual limitation or the power of dismissal which continues unaffected and the dismissal is only irregular which the Court is powerless to redress by granting any effective declaration of continuance of service.

Anchal Singh V/S Government Appeal No. 15 of 1949, D/- 17- 6- 1950. AIR 1951 J&K I (Board of Judicial Advisers).

Disputed questions of fact — Writ petition under Article 32 (2 — A) (As applied to the State of Jammu and Kashmir) effect on the maintainability of writ petition.

A petition under Art, 32 (2-A) as applied to the State of Jammu and Kashmir is maintainable where the questions of fact are not so seriously disputed as cannot satisfactorily be determined in the proceedings under Art. 32 (2 — A)

Anno. AIR Com. Const. of India, Art. 226, N. 7.

Gh. Rasul V. State of J&K Misc. Appln. No. 23 of 1955, D/- 27 9- 55. AIR 1956 J&K 17 (H. C.) F. B.

Distinction between lack of jurisdiction and acting wrongly in exercise of jurisdiction.

Held that a suit in the Civil Court would lie only on the ground that the Revenue Courts had no jurisdiction at all to proceed with the matter and had assumed jurisdiction when it did not exist, But in the other event, namely, where they have acted wrongly in the exercise of jurisdiction which vested in them a separate suit in the Civil Courts would not lie.

I. L. 25 Cal. page 833, and 876, AIR 1935, Pat. 490. AIR 1938 Lah. 198, AIR 1943, All. 282 AIR 1936 Cal. 138 distinguish.

Rajkumar V. His Highness Govt. Civil IInd Appeal No. 343 of 2002. 7 J&K LR 26 (H. C.) D. C.

Distruction of record of lower court — Appeal dismissed without perusing record — Retrial.

Held that under the present circumstances the only course which the learned Sessions Judge should have followed was to order a re-trial. The provisions of Section 423 (i) Criminal Procedure

Code are mandatory. According to section 422 Criminal Procedure Code if the appellate Court does not dismiss the appeal summarily, it shall give notice to the appellant and to such officer as the Government may appoint in this behalf. According to section 423 (1) Criminal Procedure Code the appellate Court shall then send for the record of the case if such record is not already in the Court, and after perusing such record pass an order according to law. The learned Sessions Judge had not dismissed the appeal, summarily but had sent for the record of the case. Under those circumstances it was incumbent upon him to peruse such record. AIR 1943 Mad 391 (2) referred to.

Rehman Mochi V. State, Criminal Revision No. 10 of 2006, 8 J&K RL 137 (H. C.) S. B.

Document — Production of — By plaintiff in court when both parties had adduced their evidence — the case had only to be argued — Defendant denying the genuineness of the document — gourt giving decision without applying mind to the aspect of genuineness — Effect of — Duty of the court.

Held that the decision was open to one grave objection. The Court did not apply its mind to the consideration of all important questions as to whether or not the document was genuine. Its genuineness was stoutly denied by the defendant and apart from other circumstances tending to show that the document was not genuine, its belated production by the plaintiff's was itself calculated to give rise to grave suspicion. Where the Court took the genuineness of the document for granted it begged the whole question. It had first to decide whether or not the document was genuine or not.

Samad And Others Versus Ghulam Nabi Shah And Others. Civil Appeal No. 2 Of 1949. 9 J&K LR 203 (Board).

Easements — Adjoining houses — Right of privacy — Its invasion.

Held that every owner of a house has got a right to open windows, skylights etc. in his own house and the owner of the adjoining house cannot restrict the owner of a house from enjoying his property in the manner he likes unless there is any law or custom which restricts the power of enjoyment of the owner of the house Illustration (b) of section 18 of the Easements Act, 1977, indicates the nature of this restrictive right and it is based upon the custom of the locality. Whether the customary right of privacy exists in any particular locality is a matter which falls to be determined in the evidence in a case. Likewise whether a particular custom has been so firmly established by repeated judicial recognition or otherwise so that a judicial notice can be taken of its existence, is also a matter which falls to be determined on the evidence in the case.

Held further that the question, whether a Particular construction does or does not invade the right of privacy is a question of fact to be determined on the evidence in the case.

Kesho Butt Jotshi (Defdt. Applt). Keshoo Nath & Anr. (Pltffs. Respdts) Civil Appeal No. 22 of 1947, 6 J&K LR page 130 (Board)

Egress and Internal Movement (Control) Ordinance, 2005 :- Section 3 — Notification annexed to cabinet Order No 230 — C, dated 4th April, 1949 — The accused it was alleged, was going towards the border with the intention of crossing over to Pakistan —— She was arrested at a place in the State territory which was at a distance of 160 yards from the border —— Whether the offence under section 3 brought home to the accused.

Held that mere moving towards the border was by itself no offence. The offence would be said to have been committed when the border was crossed. If an accused was arrested on the border while trying to cross over, it should be called an attempt, but if the accused was moving towards the border and had yet a good deal of distance to cover, it was mere preparation and not even an attempt for simple reason that before actually reaching the border line the accused might have changed her mind and repented of her action and come back. There cou'd be no presumption that any body who moved towards the border wanted to cross over.
Mst Noor Bibi Versus State. Revision No. 74 Of 2007. 9 J&K LR 154 (H. C.) Single Bench.

Ejectment of tenant from part only of a tenancy except at the instance of all the landlords not permissible.

The ancestors of the plaintiffs representing a private partition among the cosharers executed a sale-deed in favour of the defendents of some plots which they thought had fallen to their share. The sale deed was of occupancy rights. The vendees were put into cultivatoay possession of these plots. The sale-deed remained unregistered. The other co-sharers denied private partition and ultimately mutation in the name of the defendants was scored off by order of the Revenue Minister and they were recorded as tenants without any category. The plaintiffs brought a suit for ejectment of tenants while other co-sharers refused to join in the ejectment proceedings and insisted on retention of tenancy.

Held, that under the circumstances it is not open to a single set of landlords in a tenancy held jointly to get an ejectment order. *Boota & anr. V. Shah Mohd & Ors. Revenue First appeal No. 8 of 2002, 6 J&K LR Page 58 (H. C.) Single Bench.*

Ejectment suit — Vendors joint owners — Concurrent finding of two courts below — Claim misconceived.

Under the sale-deed the appellant gets the rights of his vendors, who according to the concurrent finding of the two Courts below were two of the joint owners, not in possession of the land under any arrangement. This alone might have given him a possible title to eject a tresspasser if the respondent had been a mere trespasser. But the respondent has been found to be one of the co-owners of abadi deh under some independent title and the view that the appeliant's remedy is to seek a partition and that the claim for ejectment is misconceived is correct.

In order to succeed in the appeal the appellant has to satisfy the Board that the concurrent finding of the two Courts below are vitiated by some error of law which the appellant has failed to do. *S. Alam Sher Khan (Pltt. — Appellant) V/s Jamadar Iqbal Khan (Deft. — Respondent) Civil Appeal No. 17 of 1947. 6 J&K LR page 104 (Board of Judicial Advisers)*

Elopement — of married women with lover — staying with him of her own free will — Both of them held guilty under S. 498 R. P. C.

In the State of Kashmir an elopement which was the result of joint advenrure by a married womon with a lover would in view of the addition to S. 498, R. P. C; that in such case the women would be guilty as an abettor, certainly come within the mischief of S. 498, R. P. C. If a married woman whose husband is living were to elope with another person, both of them will be guilty under S. 498, R. . C.P the fact that the woman with her own free will has chosen to stay with the accused and that she

is a free agent to leave him any moment she likes, would make not the slightast difference, since the wife is also liable to be dealt with as an abetter. Case law ref.
Anno. AIR Man ; Penal Code, S. 498 N. 1.
Cases Referred :
AIR 1937 Bom 186 : 38 Cri LJ 769f 1949 All 23 : 50 Cri LJ 82, 1936 Cal 450 : 38 Cri LJ 180 1939 Lah 295 : 49 Cri LJ 760, 1933 Bom 489 : 35 Cri LJ 376, 1937 Lah 617 : 38 Cri LJ 576, 26 Mad 463 ; I Weir 574.
Kesar & anr V. The State, Cr Revn. No. 69 of 2011 D/- 25-2-1955. AIR 1955 J&K 18 (H. C.) S. B.

Enemy Agents Ordinance, 2005 (VIII of 2005) — Section 3 — Enemy Agent — Accused accompanied the raiders and instigated them to shoot at Hindus and participated in the loot — Accused an Enemy Agent

Held that 'Eneny Agent' according to the definition given in the Ordinance means "a person not operating as a member of enemy armed force, who is employed by or works for or acts on instructions received from the enemy." It is in evidence that the accused who were themselves armed, accompanied the raiders and even instigated them to shoot at the Hindus and freely participated in the orgy of loot and plunder alongwith the raiders. This by itself would bring the actions of the accused under "works for the enemy," Besides this it is not only an enemy agent who can be convicted under section 3 but section 3 of the Enemy Agents Ordinance would show that besides an enemy agent any body who with intend to aid the enemy does act which is designed to endanger life can be convicted under this section.
State V. Raj Mohd & Ors. Review No. 107 of 2005, 8 J&K LR 151 (H. C.) S. B.

Fnemy agents Ordinance (VIII of 2005) Section 9 (3) Revision against order of acquittal by Special Judge whether competent.

Held that sub-section (3) of section 9 of the Enemy Agents Ordinance, 2005, empowers the reviewing Judge to call for and examine the record of any proceeding before the Special Judge for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed. The wording used in this section is almost the same as used in section 435 of the Code of Criminal Procedure and if the word 'revision' is not used in this section it makes no difference, as the word' revision' is not used in section 435 even.
State Versus Cr. Abdul Majid & Others, Criminal Revision No. 36 of 2006. 9 J&K LR 54 (H. C.) Single Bench.

Enemy Agents Ordinance (VIII of 2005) — Section 9 (3) — Revision againt order of acquittal by Special Judge Whether the reviewing Judge while hearing the revision can convert a finding of acquittal into a conviction.

Held that a reviewing Judge cannot convert a finding of acquittal into a conviction but can only order a re-trial, in case he makes his mind to accept the revision petition. The reviewing Judge while hearing a revision under section 9 (3) of the Enemy Agents Ordinance can exercise only those powers as are enumerated in section 439 of the Code of Criminal Procedure,
State Versus Dr. Abdul Majid & Others. Criminal Revision No. 36 2006. 9 J&K LR 54 (H. C.) Single Bench.

Enemy Agent — who is

Held that 'Enemy Agant' according to the definition given in the Ordinance means 'a person not operating as a member of enemy armed force, who is employed by or works for or acts on instuctions received from the enemy." It is in evidence that the accused who were themselves armed accompanied the raiders and even instigated them to shoot at the Hindus and freely participated in ihe orgy of loot and plunder alongwith the raiders. This by itself would bring the actions of the accused under "works for the enemy", Besid.s this it is not only an enemy agent who can be convicted under section 3 but sectlon 3 of the Enemy Agents Ordinance would show that besides an enemy agent any body who with intend to aid the enemy does act which is designed to endanger life can be convicted under this section.
State V. Raj Mohd & Ors. Review No. 107 of 2005, 8 J&K LR 151 (H. C.) S. B.

Endowment by a Hindu widow — order with respect to endowment made in mutation proceedings by Settlement Officer in 1892 — Order weeded out but a note indicating the purport of that order found in Goshwara Register of 1928 — Goshwara held admissible in evidence in view of the provision of section 35 Evidence Act — Suit for possession of land instituted by legal representatives of the deceased donor that endownment was conditional and the defendant had been putting the produce of land to his own use and purpose instead of utilising it in Langer.

Held that there was no unconditional 'Sankalap' or endowment. Indeed the effect of the arrangement evidenced by Goshwara appears to be no more than that of principal and agent for the purpose of realising the income of the land and spending it on a particular object subject to the cardinal condition that that agency will terminate and possession of property will revert to the owner, the moment the income was directed to some other use
Basant Singh & Others Versus Makhan Singh and others. Civil Appeal No. 6 of 1950. 9 J&K LR 98 (Board)

Escheat — When arises

Hence the plaintiffs are bound to prove that a Hindu died not only without leaving no issue but further that he left no heir under the Hindu Law so that a case of escheat arose: 12 Moo. Ind. Appl. 448 (P. C.), Rel. on.
Rassia & Ors V. Lachmi Dass & Ors. Appeal No. 1 of 1948 D/- 1-8-1950. AIR 51 J&K 23 (Board of Judicial Advisers)

Evidence — Admissibility of fresh evidence in revision — not apparent from record that fresh evidence received againt the consent of the plaintiff.

He'd that it is not apparent from the record whether the fresh evidence was received against the consent of the plaintiff and it is not possible to hold that the discretion to admit fresh evidence was arbitrarily or perversely exercised or that the evidence thus received was legally inadmissible. After all the suit has been tried under the provisions of Agriculturists' Relief Act and is not subject to any appeal under law and no question of any general or public importance is involved in the case. The Board. therefore, donot consider this a fit case in which controversy should be treated at large and as not concluded by the findings of the High Court and the evidence of the parties should be reviewed afresh before the Poard. For like reasons effect also cannot be given to the second contention of the plaintiff with regard to the remarks

made by the High Court which must be taken as limited to the case before it and not applicable to other promissory notes which are not involved in the present suit or to his accounts which were not in issue in the present case.
Sardar Sohan Singh V. Sahiboo & Ors, Civil Appeal No. 5 of 1966. 6 J&K LR page 83. (Board of Judicial Advisers).

Evidence — admissability of a note in Goshwara Register 1928, regarding the purport of order in mutation proceedings by Settlement officer in 1892 admissibie in evidence under section 35 Evidence Act.

Held that there was no unconditional 'Sankalap' or endowment. Indeed the effect of the arrangement evidenced by Goshwara appears to be no more than that of principal and agent for the purpose of realising the income of the land and spending it on a particular object subject to the cardinal condition that agency will terminate and possession of property will revert to the owner, the moment the income was directed to some other use.
Basant Singh & Others Versus Makhan Singh and Others. Civil Appeal No. 6 of 1950. 9 J&K LR 89 (Board)

Evidence — admissability — confessional statement — discovery of axe coupled with statement that he had killed the deceased with it — such statement is inadmissible.

Held, following the majority view of the different High Courts in India and of the Judicial Committee of the Privy Council, that such a statement was entirely inadmissible and should be excluded from consideration against the accused.
Atta Mohammad Versus State. State Versus Ghulam Mood. State Versus Ghulam Mohd. and Others. Criminal First Appeal No. 55 of 2006 Criminal Reference No. 10 of 2006. Criminal Revision No. 58 of 2007. 9 J&K LR 137 (H. C.) D. B.

Evidence — admissability of — Failure to record the certificate at the foot of the statement under section 164 Cr. P. C. and non compliance with the provisions of sections 164 and 364 Cr. P. C. — statement inadmissable in evidence.

Failure to record the certificate at the foot of the statement under sections 164 Criminal Procedure Code or where no attempt had been made by the magistrate to comply with the requirements of sections 164 and 364 Criminal Procedure Code, makes such a statement inadmissible in evidence and even extensive evidence of the magistrate that he had complied with such requirements does not remedy the defect.
Aita Mohammad Versus State. State Versus Ghulam Mohd. State Versus Ghulam Mond. and Others. Criminal First Appeal No. 55 of 2006. Criminal Reference No. 10 of 2006. Criminal Revision No. 58 of 2007. 9 J&K LR 137 (H. C.) D. B.

Evidence — admissibility — rent deed unregistered admissible in evidence for a collateral purpose.

In a suit for injunetion restraining the defendants from interfering with rights of ownership of the plaintiff in the property in suit; the defendant sought to adduce in evidence an unregistered rent-deed in which the plaintiff had admitted that the property in suit belonged to a third person.

Held that the rent deed was admissible in evidence for the collateral purpose of showing the plaintsff's assertion as regards the character of his possession. The nature or character of a person's possession is really proof of a transaction showing in what character a person has come upon the land. Such a transaction is really a

collateral one which, by itself, does not require to be effected by a registered deed. An unregistered document is, therefore admissible as evidence of the nature or character of a person's possession. AIR Com. On Registration Act, S, 49 N. 14, Foll.; 5 J&K. LR 153, Rel. on.

Anno. AIR Com. Regn. Act, S. 49 N. 14; 1950 Mulla: S. 49 P. 186 N "Collateal.....instrnment" and P. 188 N. "As..... possession (Case law in AIR Com. note exhaustive).

Cases Referred:

AIR 1931 Lah 885: 16 Lah 313, 1923 Lah 495: 4 Lah 249, 1939 Lah 558: 186 Ind Cas 106, 5 J&K LR 153.

Ali Mohd Bawan V. Gh. Mohiuddin & Ors. Civil Revn. No. 107 of 2010 D/- 10-10-1955. AIR 1956 J&K 24 (H. C.) D. B.

Evidence — appreciation of — evidence of Chemical Examiner.

The evidence of the chemical examiner as to the presence of human blood stains on the clothes of the accused at the time of his arrest is of little value when there is delay in despatching the clothes to the Chemical Examiner and there is absence of evidence that the articles were sealed and despatched in the presence of the accused and respectable witnesses: 1 J&K LR 37,

Rel. on. Anno. Cr. P. C; S. 367 N. 6: Evi. Act. S 1 N. 12.

Ab. Salam V. State, Cr. 1st appeal No. 29 of 2007 D/- 10-4-1952 AIR 1954 J&K 1 (H. C.) D. B.

Evidence —— Approver's evidence —— necessity of independent corroboration ——retracted confession of accused no corroboration retracted confession of accusod no corroboration of approvers evidence — both tainted — cannot corroborate each other.

Held that a retracted confession is in itself a tainted piece of evidence and stands in need of corroboration and that it is absolutely unsafe to seek corroboration of the accomplice evidence by retracted confession. It is unsafe to found a conviction on a retracted confession unless it is corroborated in material particulars and the corroboration comes from independent sources. This rule necessarily applies with greater force when a retracted confession is considered against a co-accused. But as against the maker of the confession also the aforesaid rule of prudence cannot bee ignored. As compared to the testimony of an accomplice which is on oath, a retracted confestion should require greater corroboration and further, on the principle, that one tained evidence cannot corroborate another tainted evidence, accomplice evidence ought not to be accepted as corroboration of a retracted confession.

Atta Mohammad Versus State. State Versus Ghulam Mohd. State Versus Ghulam Mohd and Others. Criminal First Appeal No. 55 of 2006. Xeiminal Reference No. 10 of 2006. Criminal Revision No. 58 of 2007. 9 J&K LR 137 (H, C.) D, B.

Evidence — Cricumstancial evidence — difference between it and direct evidence — circumstantial evidence what is —

Circumstantial evidence is as good as direct evidence with this difference that the circumstances proved against an accused must be such as exclude all inference but that of the guilt of the accused. But, if there is a missing link or that a circumstance is susceptible of another explanation favourable to the accused, such a circumstance cannot be treated as evidence against the accused.

Anno. Cr, P. C; S. 367 N. 6 Pt. 29; Evid. Act, S. 3 N. 6

Ali Shah V. State. Cr. 1st appeal No. 16 of 2010 D/- 29-3-54. AIR 1954 J&K 42 (H. C.) D. B.

Evidence — circumstantial evidence — must be conclusive.

A charge under S. 161 is one which is easily and may often be lightly made, but is in the very nature of things difficult to establish, as direct evidence must in most cases be meagre and of a tainted nature. These considerations cannot however be suffered to relieve the prosecution to establish the charge beyond reasonable doubt. If after everything that can legitimately be considered has been given its due weight. room still exists for taking the view that however strong the suspicion raised againsr the accused every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal.

Badri Nath V. State, Cr. appeal No. 1 of 1952 D/- 18-8-1952. AIR 1953 J&K 41 (Board of Judicial Advisers)

Exemption — from personal attendance — power of the trial Court to grant exemption from personal appearance

Power of trial Court to grant exemption from personal apearance. AIR 1951 All. 864 (FB) and 1947 Mad 433, Followed : 1949 Nag 334, Dissented from.

Anno. Criminal P. C ; S. 205 N. 4 (See also N. 3 Pt. 8).

1953 Mitra ; S. 205, P. 874 N. 689 "Scope of section" and 1949 Mitra ; S. 353, P. 1102 N. "When.....with.[1]"

Mst Savit.i V. L. Shiv Nath. Cr Ref. No. 179 of 201o D/- 31-12-1953 AIR 1954 J&K 40 (H, C.) D. B.

Evidence — Medical evidence — No medical evidence that the injury was the cause of death — conviction for murder not proper

Where the accused fired a gun at the deceased causing wound in the abdomen but there is no medical evidence that the injury was the cause of death, conviction under S. 326 and not under S. 302 is proper.

Anno. Penal Code, S. 302 No. 1, S. 326 N. 1.

Isher Dass V. State, Case No. 18 of 2007 D/- 26th Maghar. AIR 1954 J&K 19 (H. C.) D. B.

Evidence — of approver not to be relied upon unless corroborated in material particulars.

The rule of guidance in the case of evidence of an approver is to be found in illustrtion (b) of sections 114 and 133 of the Evidence Act. both the sections (sections 133 and section 114 illustrated) are parts of one subject and should always be considered together. The rule of law say that an accomplice is competent to give evidence and the rule of practice says that it is almost always unsafe to convict upon his testimony alone. An accomplice is unworthy of credit against an accused person unless he is corroborated in material particulars. Corroboration falls under two heads (1) general corroboration (2) special corroboration connecting each of the accused with the offence.

The test that can be laid down in order to see as to whether a particular witness is an accomplice or not, is as to whether he can be jointly indicted with the other accused in a particular case. The mere fact that the police has not secured Pardon for him would not in any way improve his position. The corroboration of an approver must be corroborated by independent evidence i. e. by evidence of a person other than that of an accompliced. It should not be lost sight of that tainted evidence cannot be made better by being doubled in quantity. Therefore, the evidence of one accomplice cannot be corroboroted by that of another accomplice.

Ghulam Nabi Bazaz & Others Versus State, Criminal Revision No. 28 of 2006. 9 J&K LR 18 (H. C.) Single Bench.

Evidence—statement of approver—exculpatory statement — evidentiary value of.

Held that though an accomplice is not an incompetent witness, the evidence of such a man who at no stage assigns to himself a conspicuous part in the plotting or execution of the nefarious crime stands in greater need of corroboration than that of an accomplice who admits to have taken an appreciable part in the preparation of the deed.

Atta Mohammad Versus State. State Versus Ghulam Mohhd. State Versus Ghulam Mohd. and Others. Criminal First Appeal No. 55 of 2006. Criminal Reference No. 10 of 2006. Criminal Revision No. 58 of 2007. 9 J&K LR 137 (H. C.) D. B.

Evidence Act (1872), S. 3 — Belief and knowledge — Distinction — Fact known by Court needs no proof — (Words and phrases — 'Belief and 'knowledge').

A distinction has to be drawn between the words 'belief' and 'knowledge'. A belief will be inculcated in the mind of a person by various facts, by evidence of witnesses or by inferences from given premises. But not so with knowledge. Knowledge is gained by a person by making use of his perceptional faculties and is clearly distinguishable from belief.

A fact, therefore, that has already come to the knowledge of the Court during the trial does not need being proved and cannot be proved so as to make the Court believe in its existence. Proof is needed of a fact which the Court does not know or believes to exist.

Anno. Evidence Act, S. 3, N. 5.

Malla Mahammado & Ors V. State, Cr 1st Appeals No. 39, 44 & 45 of 2006 D/- 23 Har 2007, AIR 1952 J&K 49 (H. C.) D. B,

Evidence Act (XIII of 1977) — Section 18 — Admission by party to proceeding or his agent.

Section 18 of the Evidence Act, 1977, makes not only the statements of a party to a proceeding, but also that of an agent "whom the Court regards under the circumstances of the case, as expressly or impliedly authorised by him, to make them" as admissible.

Abdul Ghani & Ors (Pltffs, Applts) Versus Ch. Ghulam Ahmad & Ors (Defdts. Respdts). Civil Appeal No. 21 of 1947. 6 J&K LR page 160 (Board of Judicial Advisers).

Evidence Act (1872), S. 24 — Confession, its value and corroboration.

Antecedent recoveries cannot in any way be used to corroborate or to test the truth or otherwise of a confessional statement. At the most these can be taken as a part of the statement and cannot in any way add to its weight.

Anno. Evi Act, S. 24 N. 8.

Abdul Salam V. State, Cr 1st appeal No. 29 of 2007 D/-10-4-1951 AIR 1954 J&K 1 (H. C.) D. B.

Evidence Act (1872), S. 24 — Extra-judicial confession, value of.

In ordinary circumstances extra-judicial confession are not entitled to weight because it is impossible to ascertain the exact words used by the accused in such cases. Where not only it is not possible to find out what exact were used by the accused in the extra-judicial confession but also there is definite conflict between the statements of witnessess proving the extra-judicial confession as

regards the perpetrator of the crime the extra-judicial confession must be altogether discarded .In any case it cannot be described as credible independent evidence which can be deemed sufficient for the purpose of corroborating a retracted confession. Anno. Evi. Act, S. 24 N. 8.

Abdul Salam V. State, Cr. 1st appeal No. 29 of 2007 D/-10-4-1951. AIR 1954 J&K 2 (H. C.) D. B.

Evidence Act (1972), S. 24 -- Value of retracted confession — (Criminal P. C. (1898), S. 164).

It is not illegal to found a conviction on a retracted confession provided it can be held to be voluntary and true. But the rule of prudence and caution which has been invariably followed by the Court in this respect is that a retracted confession is not better than tainted evidence and it should not be accepted, unless it is corroborated by credible independent evidence.

Anno. Evi Act, S. 24 N. 9; Cr. P. C; S. 164 N. 18.

Ab. Salam V. State, Cr 1st appeai No. 29 of 2007 D/- 10-4-51. AIR 1954 J&K 1 (H. C.) D. B.

Evidence Act (1872), S. 24 — What is confession

In a criminal case if an accused keeps silent and does not speak, it would not amount to confession of the guilt on his part. The confession of the accused should be in an unequivocal term admitting the confession of the crime.

Anno. Evidence Act, S. 24 N. 2.

Isher Dass V. State, Case No. 9 of 2007 D/- 26th Maghar 2007. AIR 1954 J&K 19 (H. C.) D. B.

Penal Code (1860), Ss. 302 and 326 — Applicability

Where the accused fired a gun at the deceased causing wound in the abdomen but there is no medical evidence that the injury was the cause of death, conviction under S. 326 and not under S. 302 is proper.

Anno. Penal Code, S. 302 No. 1, S. 326 N. 1.

Isher Dass V. State, Case No. 18 of 2007 D/- 26th Maghar 2007. AIR 1954 J&K 19 (H. C.) D. B.

Evidence Act (XVI of 1977) — Section 27 — Approvers's statement — Corroboration — Whether joint discoveries can be treated as evidence in a case.

Held that there is no such thing as a joint discovery viz: discovery made in consequence of information by more than one accused person; it is only the information first given which is admissible and where it cannot be ascertained which of the accused first gave the information the alleged discovery cannot be proved against any of the accused.

Held further that corroboration cannot be of a fact which is not mentioned by the approver, corroboration must be of some particular given by approver.

Shankar V. State, Cr. First Appevl No. 19 of 2005. 8 J&K LR 162 (H. C.) Single Bench.

Evidence Act (No XIII of 1977) :- Section 27 — Discovery of axe coupled with a statement of the accused that he had killed the deceased with it — whether the confessional statement admissible in evidence.

Held, following the majority view of the different High Courts in India and of the Judicial Committee of the Privy Council, that such a statement was entirely inadmissible and should be excluded from consideration against the accused.

Atta Mohammad Versus State. State Versus Ghulam Mohd. State Versus Ghulam Mohd and Others. Criminal First Appeal No. 55 of 2006. Criminal Reference No 10 of 2006. Criminal Revision No. 58 of 2007. 9 J&K LR 137 (H. C.) D. B.

Evidence Act (XIII of 1977) Section 30 — Confession of an accused to be considered against a co-accused.

Section 30 Evidence Act, 1977 conceives of a confession in which the confessor takes the fullest measures of guilt upon his shou'der and does not in anyway plead or even suggest a mitigating circumstance.

Malla Mohamadoo Gulla Mir Hasan Nanwai Versus State. Criminal First Appeals Nos 38.34 and 45 of 2006. 9 J&K L. R. I. (H. C.) D. B.

Evidence Act (1872), S. 30 —— Confession must implicate confessor.

Section 30, conceives of a confession in which the confessor takes the fullest measure of guilt upon his shoulders and does not in any way plead or even suggest a mitigating circumstance.

Anno. Evidence Act, S. 30 N. 3.

Malla Mohamadoo Gulla Mir Hasan Nanwai Versus State. Criminal First Appeals Nos 38.34 and 45 of 2006. 9 J&K L. R. I. (H. C.) D. B.

Evidance Act, S. 30 — Confessional statement recorded under S. 342 Cr. P. Code — Use of against co-accused.

A confessional statement of an accused recorded under S. 342 Criminal P. C ; cannot be used against his co-accused in the same trial, as the expression 'is proved' in S. 30, Evid nce Act, means that the confession to be proved must have existed before the trial i. e ; must have been recorded before the commencement of the trial AIR 1923 All. 322 ; 1931 Mad. 820, 1933 Oudh 86, 1940 Nag. 287 & 1940 Cal. 250 Rel. on.

AIR 1936 Lah. 337, Dissent.

Malla Mohammado & Ors V. State, Cr 1st Appeal Nos 39, 44 & of 2006, D/- 23 Har 2007. AIR 1952 J&K 49 (H. C.) D. B.

Evidence Act (1872), Ss. 30, 133 — Approver's statement not implicating hir self — Necessity of corroboration —(Criminal P. C. (1898), S. 337).

Though an accomplice is not an incompetent witness it is unsafe to base a conviction on his statement unless it is corroborated in material particulars. Where the approver states himself to be a mere by stander and throws the whole guilt on other accused, his evidence stands in a greater need of corroboration than that of an accomplice who admits to have taken an appreciable part in the perpetration of the offence. Ann. Evi. Act, S. 80, N. 8; S,133, N. 5; Cri. P. C., S. 337, N. 17.

Atta Mohd V. State, Cr. 1st appeal No. 55 of 2006 D/- 15 Katik 2307. AIR 1952 J&K 36 (H. C.) D. B.

Evidence Act (1872). S. 33 — Scope

A verbal application made by the Public Prosecutor for admission of evidence of a particular witness under S. 33 is not by itself a sufficient ground for admitting that vidence. It is necessary tl at under S. 33 the Judge must be satisfied that the evidence is admissible on the materials before him, namely, on the ground that the witness whose deposition is attempted to be put in was not or could not be found or was incapable of giving evidence. Anno. Evidence Act, S. 33 N. 1.

Isher Dass V. State, Case No. 18 of 2007 D/- 26th Maghar 2007.

AIR 1954 J&K 19 (H. C.) D. B.

Evidence Act (of 1977) — Section 33 — Statements of prosecution witnesses recorded before Committing Magistrate brought on record during the trial without examining the witnesses before the Sessions Judge on the ground that the witnesses could not be produced without an amount of delay which in the circumstances of the case would be wholly unreasonable — Witnesses not cross-examined — Admissibilty.

Held that, however, unfortunate the result may be the Board are unable to agree with the contention pressed upon them that such evidence shou'd be discarded. In the strict legal view there is hardly any flaw. The accused had an opportunity to cross-examine but did not do so. All the conditions laid down by section 33, Evidence Act, being present, that fact alone will not make tne evidence inadmissible.

Qadir Gujar V. State, Cr. Appeal No. 2 of 1947—6 J&K LR page 87 (Board of of Judicial Advisers)

Evidence Act (1872,) S. 35 — Entry in Goshwara Register.

An entry in a Goshwara Register prepared by a Special Officer who is charged with the duty of making a memorandum of such of the details of the weeded records as may be necessary is admissib'e in evidence under S. 35.

Anno. Evidence Act. S. 35 N. 4

Basant Singh & Others V/s Makhan Singh & Others, Civil Appeal No. 69 1950 D/- 14-6-1950, AIR 1951 J&K 6 (Board of Judicial Advisers)

Evidence Act. section 35 — note indicating the purport of a weeded out order in mutation proceedings by settlement officer in 1892 in Goshwara Register of 1928 — Goshwara admissible in evidence under section 35 Evidence Act.

Held that there was no unconditional Sankalap' or endowment. Indeed the effect of the arrangement evidence by Goshwara appears to be no more than that of principal and agent for the purpose of realising the income of the land and spending it on a particular object subject to the cardinal condition that agency will terminate and possession of property will revert to the owner, the moment the income was directed to some other use.

Basant Singh & Others Versus Makhan Sing and Other. Civil Appeal No. 6 of 1950. 9 J&K LR 89 (Board)

Evidence Act Act (1872), S. 35 — Revenue Records — Presumption of correctness attaches to entries therein

Statement of Patwari based on such record as to fact of possession of a particular time cannot be lighly brushed aside.

Anno. Evi. Act, S. 35, N. 11.

Lachman & Ors V. Aziz Ganai & Ors. Rev. 1st appeal No. 6 of 2009 D/- 8-7-1952. AIR 1952 *J&K 54 (H. C.) S. B.*

Evidence Act (XIII of 1977) — Section 45 — Opinion of experts — Handwriting expert — Whether a person familiar with the handwriting of another person a handwriting expert.

A person familiar with the hand writing of a party to a suit cannot be said to be hand-writing expert. He does not conform to that character according to the Evidence Act. Such a person is no better than ordinary witnesses and can be said only to be familiar with the party's handwriting.

Raghunath Dass & Anr V. Th. Rachpal Singh. Civil Revisions Nos. 110 of 113 of 2003. 7 J&K LR 20 (H. C.) Single Bench.

Evidence Act (1872), Sec. 60 —

Witness not deposing as to the fact from personal knowledge but stating that it was brought to his notice by another person— Evidence is hearsay.

Anno. Evidence Act, S. 60 N. 4

Sant Ram & Ors V, State, Cr Misc. Appln. No. 106 of 2008 D/-4-1-1952. AIR 1952 J&K 28 (H. C.) S. B.

Evidence Act (XIII of 1977) — Section 68 — Proof of Execution of documents less than 30 years old — Documents registered — Signatures of the scribe and the marginal witness of the deeds of relinquishments — Whether this is sufficient proof of execution of documents.

Held that this is no proof of the execution of the document In the case of documents required by law to be attested there is an additional duty cast of proving the execution by producing at least one attesting witness and it is only this additional obligation that is obviated by the proviso to section 68 in the case of registered documents; It does not mean that the execution of the document need not be proved at all. Identification of the signatures of the scribe or marginal witness is not proof of the execution of documents. This requires some evidence to identify the signature of the executants themselves.

Bhagat Singh V. Rasil Singh & Ors. Civil IInd Appeal No. 14 of 2003. 7 J&K LR 33 (H. C.) D. B.

Evidence Act (XVI of 1977) — Sections 68 and 69 — Proof of the Deed of Gift — Executant of the deed admits the execution and the deed registered — Validity challenged by the party in whose favour the same property mortgaged later on — Whether attestation of the deed necessary.

Section 68 of the Evidence Act deals with the mode of proof of the deed of gift which is required by law to be attested and in order to make a deed of gift admissible in evidence as a deed of gift it is enough to comply with the provisions of sections 68 and section 69, as the case may be, of the Evidence Act. But if the question be whether the document did create a gift or not it must be proved that the requirement of law as contained in section 123 and 59 of the Transfer of Property Act have been fully complied with. If the executant does not specifically deny the execution of a registered document then in that case the attesting witness need not be produced in proof of that document. This is what the previse to section 68 of the Evidence Act lays down, but a party who is affected by the document would not be bound by the admission made by the executant of that document. In that case the registered document will have to be proved by the production of the attesting witness and if the Validity of the document is also challenged in the sense that the document did not affect a gift in law then it must be proved by the donee that the gift deed was attested by at least two witnesses.

AIR 1932 All. 527 & 1923 Pat 436 referred to.

Sh. Raghunath Dev. V. Samad Gashru & Ors. Civil First Appeal No. 28 of 2005. 8 J&K LR 109

Evidence Act. S. 74 read with S. 35 Public Document. Mutation register — Certified copy clearly admissible in evidence.

Held further that the mutation register is a public document and its certified copy is clearly admissible in evidence under section 74 read with section 35 of the Evidence Act, 1977. The signed statement contained in the mutation order is admissible as an admission under section 21 of the Evidence Act, 1977, and the

certified copy being more than 30 years old can also be presumed to be genuine under section 99 of the said Act.
Sh. Ram & Ors V. Ramoon Shah & Ors. (Pltff. Applts) (Defet. Respot.) Civil Appeal No. 11 of 1947. 6 J&K LR page 119 (Board).

Evidence Act (XIII of 1977) — Section 90 — Copy of a document thirty years old — Copy itself thirty years old — Presumption,

The execution and contents of a lost ancient document cannot be proved merely by the production of a copy which itself is 30 years old but that this copy considered with the other evidence may give rise to a presumption as to the genuineness of the original.
Dharam Sala Suthrh Shahiyan Versus Mahant Harnam Dass & Ors. Civil IInd Appeal No. 72 of 2003. 7 J&K LR 145 (H. C.) D. B.

Evidence Act (1872), Ss. 101 to 130 — Criminal trial — (Criminal P. C. (1898), S. 367)

Though the evidence, both for the prosecution and for the defence, has, at some stage of the case, to be weighed, in criminal cases the evidence has not to be weighed in golden scales, and there must be great preponderarce of weight on the side of the prosecution before the accused can be found guilty. AIR 1944 F. C. 66 (FB) Rel. on.
Anno. Evidence Act Ss. 101 to 103 N. 3; Cr. P. C. S. 367 N. 6
Badri Nath V. State, Cr appeal No. 1 of 1952 D/- 18-8-1952. AIR 1953 J&K 41 (Board of Judicial Advisers)

Evidence Act 1872 — Sections 101, 103 — Custom

The very best possible evidence, and that of a high order, is needed to establish the existence of a custom in derogation of the personal law of the parties to a litigation. The more abnormal the custom pleaded, the heavier is the buden on the party alleging the same, and it is not permissible to infer the existence of such a custom simply on the basis of the existence of some other analogous custom which is not in conformity with the personal law of the parties.
Ramzan V. Mt Khatji Appeal No. 4 of 1950. decided by the Board of Judicial Advisers on 21-6-1950. AIR 1951 J&K 12

Evidence Act (1872) Ss. 101—103 Undue influence Onus of proof,

In a suit for damages for breach of contract, the burden of proof of the plea of undue influence is on the defendant. It is the clear duty of the defendant to give his own evidence in support of this plea. And only after the defendant has given his evidence it is the duty of the plaintiff to give his evidence in support of his case and to contradict the case of the defendant. And the plaintiff is not required in any circumstance to cite defendant as his own witness.
Anno: Evidence Act, Ss. 101 - 103 N. 33
Ganda Mal V. Bhulloo Ram, Appeal No. 1 of 1950 decided on 15-6-1950 by the Board of Judicial Advisers. AIR 1951 J&K 5

Evidence Act (1872), S. 103 — burden of estalishing guilt — Duty of prosecution

The burden of establishing guilt of the accused is throughout on the prosecution and the prosecution must prove every link in the chain of evidence against the accused from the begining to the end. When two persons are seen together and shortly afterwards one of them is found to have been murdered it cannot be inferred positively that

his companion is responsible for the murder of the deceased unless there are other circumstances that the deceased was last seen in the company of the accused raises a strong suspicion against the accused but mere circumstances of suspicion without more conslusite evidence are not sufficient to justify conviction of the accused.
Anno. I. P. C ; S. 300 N. 43. 45 ; Ev. Act, Ss. 101 to 103 N. 3.
Samad Malik V. State, Cr 1st appeal No. 8 of 2009 D/- 9 Assuj 2009. AIR 1953 J&K 2 (H. C.) D. B.

Evidence Act (1872), S. 114

Defendant in possession need not prove his title — Plaintiff who is seeking possession has to prove his title in it — Defendant has prima facie title against all the world except the true owner.
Anno. Fvidence Act, S. 114 No. 26
Garibu & Ors V. Bhagat Lakhshami Narain. Civil 2nd appeal No. 45 of 2006 D/- 14-1-1952. AIR 1952 J&K 24 (H. C.) D. B.

Evidence Act (No. XIII of 1927) — Section 112 — Birth during marriage — Legitimacy.

Held that section 112 of the Evidence Act adopts the date of birth and not the date of conc ptic n as the basis of legitimacy and provides that birth during the continuance of a valid marriage is conclusive proof of legitimacy. But before such a conclusive presumption can be drawn it must be shown that there was a valid marriage subsisting between the parties at the time of the birth.
Atta Mohd V. Firda Mohammad. Cixil IInd Appeal No. 1 of 2003 in Forma Pauperis. 7 J&K LR 99 (H. C.) D. B.

Evidence Act (1872) — S. 114 — Presumption as to maintenance of a widow under Hindn law — Death of father-in-law — mutation of property in the name of the widow of pre-deceased son aolng with two other sons—possession of widow for more than twelve years.

On the death of A the lands left by him were mutated in the name of his two sons B and C and the widow of a third son who had died during the lifetime of A. Along with B and C, the widow also entered into possession of the land that was mutated in her name and retained it all along in her exclusive possession. Later on, the widow executed a will by which she bequeathed the property mutated in her name to B. After her death C brought the present suit on the ground that the widow being a Hindu widow could not alienate the property mutated in her name ; he prayed a decree for 1/2 of the property mutated in widow's name.

Held (1) that according to Hindu law the wife of a predeceased son is not an heir of her father-in-law. All that she cou'd claim in the family estate was maintenance. 1927 Oudh 138 rel. on.

(2) that according to Hindu law there was no presumption that 1/3rd share alloted to the widow on the death of her father-in-law was in lieu of her maintennance ; 1949 All 458 rel. on.

(3) that there was no evidence to establish that the mutation was effected in the name of the widow as a result of an arrangement arrived at between the heirs of A and as such her possession started from the very begining adversely to other heirs of A. 1955 All 630 and 1940 Ovdh 269 Ref.

(4) that the widow having remained in adverse possession for more than twelve years, her possesston matured actually into ownership and that she had power to alienate it by will without

tloer hinderance from any quarter.
Anno : AIR Com. Lim. Act, Arts. 142 and 144 N. 22, 23 ; AIR Man. Evi. Act, S. 114 N. 20.
Cases Referred:
1927 Oudh 138 : 99 Ind Cas 890, 1949 All 458, 1955 All 630, 1940 Oudh 269 . 187 Ind Cas 179.
Bhagwan Dass V. Krishenial & Ors. 2nd appeal No. 109 of 2011 D/- 1-2-56. AIR 1956 J&K 37 (H. C.) D. B.
Evidence Act — sections 114 and 133.

The rule of guidance in the case of evidence of an approver is to be found in illustation (b) of sections 114 and 133 of the Evidence Act. Both the sections (section 133 and section 114 illustrated) are parts of one subjcct and should always be consideted together. The rule of law that an acomplice is competent to give evidence and the rule of practice says that it is almost always unsafe to convict upon his testimony alone An accomplice is unworthy of credit against an accused person unless he is corroborated in materiol particulars. Corroboration falls under two heads (I) general corroboration (2) special corroboration connecting each of the accused with the offence.

The test that can be laid down in order to see as to whether a particular witness is an accomplice or not, is as to whether he can be jointly indcted with the other accused in a particular case. The mere fact that the police has not secured parden for him would not in any way improve his position. The corroboration of an approver must be corroborated by independent evidence i.e. by evidence of a person other than that of an accompliced. It should not be lost sight of that tainted evidence cannot be made better by being doubled in quantity. Therefore, the evidence of one accomplice cannot be corroborated by that of another accomplice.
Ghulam Nabi Bazaz & Others Versus State; Criminal Revision No. 28 of 2006. 9 J&K LR 18 (H C.) Single Bench.
Evidence Act (1872), Ss. 114 and 133 — Approver — Evidence by — Corroboration — Necessity — (Criminal P. C. (1898), S. 337)

A conviction based upon the uncorroborated testimony of an accomplice is not illegal, though it is highly dangerous to base a conviction upon his uncorroborated evidence. It is a wholesome rule of practice that an approver must be corroborated before he is treated as worth of credit. The question of corroboration, hower, is not an easy one, and in every case the Court has to see that the corroboration forthcoming is not only in general terms but must specifically connect each accused with the actual commision of the offence.
AIR 1232 Lah. 204 Foll. Case Low Ref.
Anno ; Evi Act, S. 114 N. 3, 4, S. 133 N. 4, 6 : Cr. PC ; S. 337 N. 17.
Gh. Nabi & Ors V. State, Cr Revn. No. 28 of 2006 D/- 9 Maghar 5006. AIR 1953 J&K 4 (H. C.) S. B.
Evidence Act (1872) — S. 114 — Presumption — Whether a Joint family possesses joint property — Burden of Proof.

It is true that there is no presumption under the Hindu Law that a joint family possesses property but if once it is proved or admitted that a family is joint and any member claims any portion of the property as his separate property, the burden of proof lies on him to show that it was acquired by him in circumstances which would constitute it as his separate property.

AIR 1931 Lah. 419 : Reld. on.
Anno. Evidence Act, S. 114 No. 20.
Lok Nath V. Rohlu Ram First Appeal No. 29 of 2006, D/- 19 Baisakh 2008. AIR 51 J&K 25 (H. C.) D. B.
Evidence Act (1872) S. 114 — C. P. C. (1908). O. 18 R. 2.

It is a bad practice that when parties are in a position to give personal evidence they should refrain from entering the witness box. If such evidence is withheld without sufficient cause, the Court is not only entitled but is bound to draw an adverse inference against the party who has thus withheld evidence. It is a still more objectionable pratice to cite opposite side as one's own witness. This places the examination and cross-examination of such a witness in wrong hands, necessitates the criticism of the evidence by the side which has called it and this embarrasses fair trial and causes obstruction of juice.
Anno. C. P. C. 0. 18, R. 2, N. 1
Gandamal App. Vs. Bhullooram Respdt. Appeal No. 1 of 1950 D/- 15-6-1950. AIR 1951 J&K 5 (Board of Judicial Advisers)
Evidence Act S. 116

The partition is a transfer of property within the meaning of Section 5 and Section 109 as it has been held to be a miscure of surrender and a conveyance of right in a property.

The defendant had by virtue of a rent deed taken on lease a small house from the plaintiff. This house was the part of some joint property which was owned by four persons including the plaintiff. These persons who were related to each other as brothers or cousins effected a partition of their joint property and this house which was rented out to the defendant fell to the lot of other three persons.

Held that any rights of realizing rent or ejecting the defendant which were possessed by the plaintiff once had ceased to exist so far as he was concerned and those rights were now vested in his co-sherers to whom the exclusive ownership had been transferred by partition. On the date of transfer (in this case partition) the relationship of land lord and tenant ceased to exist between the plaintiff and the defendant Therefore the defendant was not debarred from pleading that he was not bound by any relationship of landlord and tenant so far as he and the plaintiff were concerned. Chitaly's T. P. Act cited with approval.
Anno. T. P. Act, S. 5 N. 4; Evidence Act, Section 116 N. 9
Skattar Singh V. Rawelo. 2nd Appeal No. 94 of 2007 D/- 26th Poh 2008. AIR 1952 J&K 18 (H. C.) S. B.
Evidence Act (1872), S. 124 — Communication made in official confidence.

Whether a communication was made in official confidence is a matter subject soleIy to judicial decision and if once the Court comes to the conclusion that the communication has been made not in official confidence, then the public officer to whom the communication has been made has no other alternative but to produce the documents, irrespective of the fact that in his opinion the interests of the State would suffer by such a disclosure. If, however. the Court comes to the conclusion that the communication was made in official confidence, then it is for the officer alone to whom the communication has been made to decide as to whe ther the document should be produced or not. If he elects not to produce it, the Court cannot compel him to produce. AIR 1945 Bom 122; 1943 Mad 278 and 1943 Cal 539, Rel. on. Anno. Evi, Act, S. 124 N. 2.

L. Tirath Ram V. His Highness Govt. J&K Original Suit No. 2 of 2007 D/- 29 Bhadom 2007. AIR 1954 J&K 11 *(H. C.) S. B.*

Evidence Act (1972), S. 124 — Privilege as to official communication.

A distinction has to be drawn between cases where two citizens engage to civil litigation and want official communications to be disclosed at the time of the trial, and cases, in which the State has entered into a commercial transaction with a private citizen in the course of which the State has made certain communications pertaining to the cases in which it is interested as a defendant or a plaintiff. In the eirher way, a Government officer is expected to keep before himself only the interests of the public before a privilege is claimed. But in a case in which the State itself is a party, the mind of a responsible officer of the Government has been applied to the question as to whether the safety of the public interests warrants giving or withholding of the information. The Court must also be convinced that the privilege is not claimed to avoid inconvenient disclosures which may tell against its own side in the litigation or as a matter of mere departmental routine.

In order that a Court should arrive at the finding that the communications were made in official confidence whose disclosure would cause public interest to suffer, it has got to be seen whether this disclosure would be injurious to national defence, or to good diplomatic relation, or for the proper functioning of the public service, so as to allow those documents to be kept as secret. The bare fact that the production of the documents might adversely tell upon the fortunes of the litigation would not be sufficient to hold that the documents were made in official confidence and that their disclosure would affect adversely the interests of the State.

Communications made by one officer to another in matters which arise out of commercial relations which subsist between the State on the one side and a private citizen on the other cannot be treated as communications made in official confidence.

AIR 1950 EP 228 (FB), Rel. on.

Anno. Evi, Act, S. 124 N. 3.

L. Tirath Ram V. His Highness Govt. J&K Original Suit No. 2 of 2007 D/- 29 Bhadon 2007. AIR 1954 J&K 11 (H. C.) S. B.

Evidence Act (1872), S. 126 — Opinion of legal adviser.

Opinion given by the Law Secretary who functions as a Legal Remembrancer to the State, regarding the plaintiff's claim against the State and which are in the nature of an advise given by the legal adviser to his client are priviledged.

Anno. Evi. Act, S. 126 N. 1, 2.

L. Tirath Ram V. His Highness Govt. J&K Original Suit No. 2 of 2007 D/- 29 Bhadon 2007. AIR 1954 J&K 11 *(H. C.) S. B.*

Evidence Act (1872), S. 133 — Evidence of accomplice — Corroboration by retracted confession — Validity.

A retracted confession is in itself a tainted piece of evidence and stands in need of corroborotion and it is absolutely unsafe to seek corroboration of the accomplice evidence by retracted confession : 3 J&K LR 102 and 3 J&K LR 172, Rel. on.

Anno. Evi. Act, S. 133 N. 4, 6, 11.

Atta Mohd V. State, Cr 1st Appeal No. 55 of 2006 D/- 15 Katik 2007. AIR 1952 J&K 36 (H. C.) D. B.

Evidence Act (1872) Ss. 133 and 114 — Accomplice — Who is

— Evidence by, must be corroborated by independent witness

The word accomplice has not been defined in the Evidence Act and must be taken in its ordinary sense. Ordinarily an accomplice means a guilty associate or a partner in a crime or who is some way or the other connected with the offence in question. The test that can be laid down, in order to see as to whether a particular witness is an accomplice or not is as to whether he can be jointly indicted with the other accused in a particular case.

The evidence of one accomplice cannot be corroborated by that of another accomplice and in order to connect each accused with the offence, corroboration must be by independent evidence.
Anno. Ev. Act, S. 114 N. 2; S. 133 N. 2, 4, 8.
Gh. Nabi & Ors V. State, Cr. Revn. No. 28 of 2006 D/- 9 Maghar 2006. AIR 1953 J&K 4 (H. C.) S. B.

Evidence Act (1872), S. 154 — Result of cross-examination

The fact that the witness was declared hostile by the Court at the request of the prosecuting counsel and he was allowed to cross-examine the witness furnishes no justification for rejecting en-block the evidence of the witness. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to the same.
Anno. Evidence Act, S. 154 N. 7
Badri Nath V. State, Cr. appeal No. 1 1952 D/- 18-8-1952. AIR 1953 J&K 41 (Board of Judicial Advisers)

Evidence—unregistered doument—Compulsorily registerable under S. 49, Registration Act (1908) — Inadmissible in evidence as regards the transaction affecting immoveable property—May yet be admitted as evidence of any purpose other than this e. g. for explaining the nature of possession.

Under S. 49, Registration Act a compulsorily registerable document, though unregistered and inadmissible in evidence of a transaction affecting immovable property, may yet be admitted as evidence for any purpose other than that of creating or declaring a right to immovable property such as for explaining the nature and character of the possession. The fact that a proviso similar to that added to the S. 49 of the Indian Registration Act. is absent in S. 49 of J and K Registratiou Act would make no difference.
Anno. AIR Com: Reg. Act, S. 49 N. 14: 1250 Mulla, S. 49 P. 186 N. "Collateral..... ... .instrument" and P. 188 N, "As..... possession" (Case law in AIR Com. exhaustive).
Case *Referred:*
9 Cal 520: 12 Cal LR 239 (FB)
AIR 1919 PC 44: 43 Mad 244.
Musa & Ors V. Amir Wani, Civil Revn. No. 54 of 2011 D/- 20 12-1954. A1R 1955 J&K 31 (H. C.) S. B.

Evidence — Whether Joint discoveries—can be treated as evidence in a criminal case — S. 27 Evidence Act.

Held that there is no such thing as a joint discovery viz; discovery made in consequence of information by more than one accused person; it is only the information first given which is admissible and where it cannot be ascertained which of the accused first gave the information the alleged discovery cannot be proved against any of the accused.

Held further that corroboration cannot be of a fact which is not mentioned by the approver, corroboration must be of some particular given by approver.

Shankar V. State, Cr. First Appeal No. 19 of 2005. 8 J&K LR 162 (H. C.) Single Bench

Evidence — whether statement cf accused before the committing magistrate can be read as evidence—whether it has more weight than a mere confessional statement — whether can be acted upon if accepted to be true.

A statement of accused before the committing Magistrate is certainly entitled to greater weight than a mere confessional statement and can be read as evidence under S. 287. But while this is so such a statement has to fall or stand upon its own intrinsic merit. If the story disclosed by it can be accepted as true and worthy of reliance, it can be acted upon but not otherwise. If such a statement has been found to be tutored by police and retracted in Sessions Court, no coviction can be based upon it.

Anno. Cr. P. C; S. 287. N 1.

Abdul Salam V. State. Cr. 1st appeul No. 29 of 2007 D/- 10-4-1951. AIR 1954 J&K 1 (H. C.) D. B.

Examination of accused — statement of one accused whether can be considered against a co-accused if it is a confessional statement.

Held that a confessional statement recorded under Section 342 Criminal Procedure Code cannot be considered under Section 30 of the Evidence Act, 1977, against a co-accused in the same trial The meaning given to the phrase "is proved" as it occurs in section 30. Evidence Act, 1977, is that the confession to be proved must have existed before the trial has begun i. e. must have been recorded. before the trial of the case commenced.

Malla Mohamadoo Gulla Mir Hasan Nanwai Versus State. Criminal First Appeals Nos 38. 44 and 45 of 2006. 9 J&K L.R.I. (H. C.) D. B.

Examination of the accused — Use of confessional statement against co-accused

A confessional statement of an accused recorded under S. 342. Criminal P. C; cannot be used against his co-accused in the same trial as the expression 'is proved' in S. 30, Evidence Act, means that the confession to be proved must have existed before the trial i. e; must have been recorded before the commencement of the trial

AIR 1923 All. 322; 1931 Mad. 820, 1933 Oudh 86. 1940 Nag. 287 & 1940 Cal. 250 Rel. on.

AIR 1936 Lah. 337 Dissent.

Malla Mohammadoo & Ors V. State, Cr. 1st Appeal Nos 39. 44 & 45 of 2006. D/- 23 Mar 2007. AIR 1952 J&K 49 (H. C.) D. B.

Executive power — exercise of—whether absolved from following the law as it stands.

Held exercise of executive power does not absolve an officer from following the law as it stands. In a democratic regime a wholesome check is placed upon the vagaries of the individaul officers by different provisions of law. These must be followed meticulously —

Waryam Singh V. State, Cr. Misc. No. 97 of 2009. 8 J&K LR 14 (H. C.) D. B.

Execution of decree — Instalment decree — Default in payment of two consecutive instalments entire decretal amount becoming due — Decree-holder claiming entire sum on default — If decree-holder's application for recovery of entire sum becomes time

barred. Can he claim such instalments as fall due within 3 years.

Held that though cases are conceivable in which a decree-holder may retain locus penetentoe, where the decree-holder definitely signified his option to the judgment - debtor and the Court that the instalment nature of the decree had been put an end to, he cannot claim instalments as are not barred by limitation.
Pt. Tara Chand Zutshi (JD-Applt) Versus Prem Nath Kanaw (DH-Respd) Civil Appeal No. 19 of 1947. 6 J&K LR page 171 (Board of Judicial Advisers).

Execution of decree — Limitation — Third application for execution alleged to be filed by an unauthorised person — Objection to the validity of the third application for execution not set forth in the objections filed by the judgment debtor in the executing Court, nor point argued before that Court — Even in memorandum of first appeal no such objection taken — Objection for the first time raised in arguments before the first appellate Court — Whether subsequent application for execution barred by limitation.

Held that it was not fair to the decree holder to allow the judgment debtor to raise the point before the appellate Court. In the absence of an opportunity being afforded to the decree holder to meet the belated objection it is impossible to speculate as to the grounds that could have been advanced by the decree holder to frustrate the objection raised by the judgment-debtor.
Prabh Dial & Others Versns Hans Raj and Others. Civil Appeal No. 9 of 1950. 9 J&K LR 100 (Board)

Execution proceedings — debt contracted by father a non-agriculturist — He dies before or after the decree is passed — Son who is an agriculturist inherits a residential house from his father — whether the house is liable to be attached and sold in execution of the decree against the father or the son — the crucial test.

Held that in such a case the crucial test is whether on the date of application for execution of decree by attachment of the house it is the residential house of the agriculturist to whom it belongs and against whom the process of execution is applied for. The intention of the Legislature obviously is that every agriculturist whether he is liable in his personal capacity or otherwise should have his residential house secured to him agatnst the processes in execution.
I. L. R. 7 Bombay, P. S30, AIR Allahbad 1928, P. 211; AIR 1932 All. 1902 All. P. 508; AIR 1939 Lahore 556; AIR 1940 Lahore 320 referred to.
Feroz V. S. Jai Singh, Civil Appeal No. 7 of 1947. 6 J&K LR page 90 (Board of Judicial Advisers).

Existing law — whether J & K Essential Supplies (Temporary Powers) Ordinance (2003) is existing law within the meaning of Articles 305, 366 (1) and 372 read with para 16 (b) (ii) of the Constitution (Application to J&K) Order, 1954.

Sub-s. (1) of S. 3 of the Ordinance is not hit by any provision contained in part XIII of the constitution. The Ordinance was passed in 2003 by the then Ruler under S. 5 of the Jammu and Kashmir Constitution Act. 1996, as it was then in force and falls within the phrase "existing law" as used in Art. 3.5 (vide Art. 366 (1) and Art, 372 read wfth para 16 (b) (ii) of the Constitution (Application to Jammu and Kashmir) Order, 1954).

T. C. Nanda V. State of J&K Writ Pet. No. 64 of 1955 D/- 2-1-1956 AIR 1956 J&K 26 (H. C.) D. B.

Expert-opinion of—Handwriting expert who is—whether a person familiar with the handwriting of a party is handwriting expert.

A person familiar with the hand writing of a party to a suit cannot be said to be hand-writing expert. He does not conform to that character according to the Evidence Act. Such a person is no better than ordinary witnesses and can be said only to be familiar with the party's handwriting.

Raghunath Dass & Anr V. Th. Rachpal Singh, Civil Revisions Nos. 110 and 113 of 2003. 7 J&K LR 20 (H. C.) Single Bench.

Final Order — an order of the High Court, Setting aside a compromise recorded by a lower court is not a final order.

Held that an order of the High Court, setting aside a compromise recorded by a lower Court, is not a final order so as to be open to appeal to His Highness under Section 2 (a) of the Appeals to His Highness' Act, 1996.

Th. Bhikam Singh V. Surjan Singh 4 J&K LR 41 followed: 60 Indian Appeals 76 referred to.

Sheikh Ghulam Ghaus, V/s S. Gazanfar Ali Shah & Anr. Civil appeal No. 2 of 1947 — 6 J&K LR 55 (Board of Judicial Advisers).

Finding of fact — Adverse Possession and Prescriptive right is a question of fact.

That a person had been in adverse possession of property and had acquired mortgagee right by prescription is finding of fact,

Anno. Civil P. C. Ss. 100-101 N. 36

Garibu & Ors V. Bh. Lakhshami Narain, Civil 2nd appeal No. 54 of 2006 D/- 14-1-1952. AIR 1952 J&K 21 (H. C.) D. B.

Finding of fact — concurrent finding of fact — interference with

It is true that concurrent findings of facts are binding on the second appellate Court and cannot be challenged in second appeal but when they are based wholly upon surmises or conjectures without any positive evidence to support them, they can be set aside in second appeal.

Anno. Civil P. C. Ss. 100 and 101 N. 54.

Garibu & Ors V. Bh. Lakhshmi Narain. Civil 2nd appeal No. 45 of 2006, D/- 14-1-1952. AIR 1952 J&K 24 (H. C.) D. B.

Finding of fact — concurrent finding of fact — whether Board of Judicial Advisers bound by it

The question whether a particular transaction is a sham one or not, is a question of fact and in such a matter the Board is bound by the concurrent findings of fact arrived at by the Courts below.

Anno. C. P. C. S. 100 N. 54.

Sh. Raghumath Davl V. Kh. Samad Gashrv, Civil Appeal No. 2 of 1950 D/- 18-6-1961. AIR 1952 J&K 30 (Board of Judicial Advisers)

Finding of fact — Provincial Small Cause Courts Act (1887) S. 25 — interferenee on question of fact

Normally the finding of fact recorded by the trial Court is not fnterferred with in revision but when the trial Court has brushed aside the documentary and oral evidence without giving any good reason for doing so and has returned a firding contrary to the evidence on record, the finding arrived at by the trial Court can be overset in revision.

Anno. Prov. Small Cause Courts Act, S. 25 N. 11

Hari Chand V. Karam Chand, Civil Revn. No. 62 of 2008 D/- 24-1-1952. AIR 1952 J&K 27 (H. C.) C. J.

Finding of fact — whether a particular transaction is a sham is a question of fact.

The question whether a particular transaction is a sham one or not, is a question of fact and in such a matter the Board is bound by the concurrent findings of fact arrived at by the Courts below.

Anno. C. P. C. S. 100 N. 54.

Sh. Raghunath Devi V. Kh. Samad Gashru, Civil Appeal No. 7 of 1950 D/- 18-6-1951. AIR 1952 J&K 30 (Board of Judicial Advisers).

Food Offences (Enhanced penalties) ordinance (III of 2006) Section II-Revision to High Court against order of the Sessions Judge passed in appeal from the order of conviction by the Special Magistrate, whether competent.

Held that revision to High Court against order of the Sessions Judge passed in appeal from the order of conviction by the Special Magistrate is competent, According to Section II of the Ordinance the exclusion of interference in revision is limited only to the orders of sentences passed by a Special Magistrate. Intention of the Legislature is to be inferred from the language used by them.

A. I. R. 1943 All. 26, distinguished.

Qadir Chhandu Versus State. Criminal Revision No. 87 of 2095. 9 J&K LR 61 (H. C.) Single Bench.

'Foreign Court' as defined in C. P. C. — whether repugnant to Articles 5 and 261 (3) of the Constitution.

The definition of 'foreign Court' in J&K Civil P. C. before amendment of 2011 must be held subservient to the provisions in the Constitution of India, namely Art. 5, conferring on the State subjects the citizenship of India and Cl. (3) of Art. 261 by which final judgments or orders delivered or passed by civil courts in any part of the territory of India are made capable of execution anywhere within that territory. The definition of 'foreign Court' must to the extent of its repugnancy to the provisions indicated above be held inoperative and of no effect.

Therefore an exparte decree passed by the Amritsar Court on 4- 6- 1951 against the State subject was executable in the State Courts on the date when the decree-holders' application for execution instituted on 27- 10- 1950 was rejected by the executing Court at Jammu on 25- 10- 1952.

Anno. AIR Com.: Const. Of India' Art. 5. N. 1.
S. 2 (5) P. 10 (7 Pts. extra in AIR Com)
AIR Com: Civil P. C; S. 44 N. 2, 1953 Mulla: S. 44 (Topic discussed in AIR Com; extra)

CASES REFERRED.

A. 22 ('94) 222; 21 Ind App 171 (PC)
B. AIR 1953 Hyd 19: ILR (1952) Hyd (1952) Hyd 1030
C. 1955 Madh - B 1: Madh - B L J 1954 HCR 1111 (FB)
D. 1951 Bom 190 ILR (1950) Bom 640

M. L. Saraf V. Firm Bhagwan Das Gurdyal. First Appeal No. 32 Of 2009 D/- 19-1-1955. A1R 1955 J&K 5 (H. C.) F. B.

Fraud upon the Statute — what is

If a person exercises powers conferred on him in bad faith or for a collateral purpose it is a fraud on the Statute and is not really an exercise of the power at all and a Court can inter-

fere with such colourable exercise of the power.
Waryam Singh V. State, Cr Miscellaneous No. 97 Of 2005. 8 J&K LR 14 (H. C.) D. B.

Fundamental rights — Whether J&K Preventive Detentive Act (2011) excepted from the operation of Fundamental Rights as an effect of Art. 35 (c) of the Constitution of India.

Per Wazir, C. J.: The effect of Art. 35 (c) is that the Jammu and Kashmir Preventive Detention Act is excepted from the operation of the fundamental rights. Further, as the word 'modify' used in Art. 370 means to change and to limit, the President has limited the operation of Art. 13 under his powers to modify.
M. Subhan & Ors V. State, Cr. Misc. Applns. Nos. 38, 40, 42, 44, to 48, and 51 of 1955 D/- 2-8-1955. AIR 1956 J&K 1 (H. C.) F. B.

Gift — invalid — recital in the invalid deed — use of — Recitals in an invalid gift may be referred to as explaining the nature and the character of possession thenceforth held by the donee.

Held that the unregistered deed of gift did not convey any right to the donees nor, in the circumstances of the case, the character of the defendants' possession was in any way changed and that the defendants have throughout been in possession as co-sharers on behalf of themselves and plaintiff.

Recitals in an invalid gift may be referred to as explaining the nature and character of the possession thenceforth held by the donee.
I. L. R. 43 Mad. 244, A. I. R. 1944 Rangoon III and 5 J & K Law Raports 152, distinguished.
Teoppi Versus Paras Ram. Civil Appeal No. 5 of 1950. 9 J&K LR 85 (Board)

Government — poewer of to take action not specifically authorised to do by the Legislature.

The Government can exercise only those powers which have been delegated to it by the legislature. Governments have no inherent powers of their own. They have to execute the wishes of the legislature which in fact has the sovereign authority. If the legislature does not in specific words authorize the Government to take a certain action againt a person who is dealt with under some law, the power to take such action cannot be presumed without a clear provision of law.
Gh. Nabi Jan V. State. Misc. Cr. Case No. 109 of 2010 D/- 28-7-1955. AIR 1954 J&K 7 (H. C.) D. B.

Grant — Construction — Crown Grant — Essentials — Order passed as highest revenue authority and not as sovereign — Order does not operate as grant.

In order to interpret the order of a Ruler of the State, the surrounding circumstances and the intention of the Ruler have to be taken into consideration. No doubt, the Ruler is vested with sovereign jurisdiction in all matters relating to the State but it is open to him to separate his jurisdiction in several matters and to exercise it separately and it is a question of a fact in each case what particular jurisdiction he is exercising.

Where, therefore, in confirming an order recording a person as malguzar of a village Ruler was only accepting the recommendation of the revenue authorities and giving his approval to their act as the highest revenue authority in the land and was not exercising in any manner his sovereign powers to make a

fresh grant in favour of his subject which had not existed before or to surrender the Crown rights by a fresh grant which had not been alienated previously, the order does not operate as a grant. *Bhagtu & Ors Vs Wazir Moti Ram & Ors. Civil Appeals Nos 11 And 12 Of 1950. AIR 1951 J&K 14 (Board of Judicial Advisers).*

Grant — Crown Grant — Entry of proprietary interest in revenue records — Effect as grant.

The entry of proprietary interest in Revenue records is good enough for revenue purposes but it is not sufficient by its own force to create or extinguish proprietary rights in persons affected by the entry. Similarly, an order of removal of a man's name from proprietary column of revenue records even when accompanied by a consenting statement of the Ruler does not divest him of his proprietary interest in the land unless it is possible to found a valid grant upon the consenting statement.

Bhagtu & Ors Vs Wazir Moti Ram, Civil Appeals Nos 11 and 12 Of 1950. AIR 1951 J&K 14 (Board of Judicial Advisers).

Grant — Crown Grant — Interpretation — Responsibility lies with civil courts, not with ruler.

The responsibility of interpreting the terms of a grant ultimately rests upon the Civil Court and it is not possible to regard the Ruler of a State in interpreting the terms of grant as exercising the jurisdiction of a Civil Court.

Bhagut & Ors V. Wazir Moti Ram & Ors. Civil Appeals Nos. 11 and 12 of 50. Decided by the Board of Judicial Advisers on 10-7-1950. AIR 1951 J&K 14

Guardians and Wards Act (1890), S. 25 — Custody of minor — Interest of child — Mother to be preferred to father where he has contracted another marriage.

Where a Hindu has contracted a marriage with another woman and his wife living separately asks for the custody of the child born of her, then even though the father remains the natural guardian of the child, the custody of the child in its own interest, is to be with its mother. 1941 Bom 103 Foll.

Anno. AIR Man. G. and W. Act, S. 25 N. 8.

CASES REFERRED.

1941 Bom 103 : ILR 1941 Bom 455

Biru V. Beharilal, First Appeal No. 41 of 2011 D/- 22-12-1955. AIR 1956 J&K 31 (H. C.) D. B.

Habeus Corpus — Married woman detained in a refugee camp in the State — Woman determined to live with the husband in the State — Habeus corpus petition by the husband—No law of protective detention in the State — The abducted person's recovery and Restoration Act, 1949 passed by Indian Legislature not applicable to the State of J & K — Detention not justified. Abducted persons Recovery and Restoration Act 1949 — Act passed by Indian Legislature not applicable to J & K State.

Held that in the absence of any law in the State, a Camp Officer of a Refugee Camp cannot detain a person against the will of such person in a camp established in the State for the reception and restoration of abducted persons and it is no argument that the detained person is very well looked after in the camp.

The abducted persons Recovery and Restoration Act, 1949 passed by the Indian Legislature is not applicable to the Jammu and Kashmir State and therefore, detention of a person in a camp in the State connot be held justified under the provisions of that

Mst. Barkati Versus State. Criminal Miscellaneous Petition No 99 Of 2006. 9 J&K LR 14.

High Court — Exercising power under Article 32 (2a) Constitution of India as applicable to the State of Jammu and Kashmir — not to sit as a Court of appeal to revise the orders passed by the Government nature of jurisdiction to be exercised.

Where the Government has removed the petitioner from certain post i. e; Chairmanship of Town Area Committee, the High Court of Jammu and Kashmir will assume jurisdiction in such matters only if an authority which is bound to follow the provisions of a statute acts in contravention of those provisions. But if the Government or such authority acts according to the procedure provided by the said statute, holds an inquiry as provided by law, and then arrives at some conclusion. High Court of J. and K. will not and cannot interfere on the ground that these conclusions are not warranted by facts.

The High Court of J. and K. is not sitting as a Court of Appeal to revise the orders passed by the Government. Nor is that Court going to order any inquiry as to whether certain facts alleged on behalf of the Government or the petitioner are right or wrong. The Court will only see if the petitioner has not received equal protection of law.

Anno. AIR Com; Const. of India, Arts. 226 and 32 N. 28.

Jawala Prakash V. State of J&K & Anr. Misc. Appln. No. 231 of 2011 D/- 21-4-55. AIR 1956 J&K 32 (H. C.) S. B.

High Court's power of superintendence over Court of Rent Controller — J&K Constitution Act (14 of 1996) — S. 64—High Court has the power —

Under S. 64 of the J. & K. Constitution Act read with S. 22 of the Letters Patent, the High Court has power of superintendence over Courts over which it has revisional or appellate jurisdiction. As S. 21 of the Houses and Shops Rent Control Act, 2009, Sub-s. (5) empowers the High Court to hear revisions from an order of the District Judge passed in appeal against the order of the Controller it can exercise superintendence over the Court of the Controller as well.

The power of superintendence should be exercised very sparingly and only in those cases where a party is likely to suffer irreparable damage in case an order of the Court is allowed to stand. When there is another remedy open to a party the power of superintendence of the High Court cannot ordinarily be invoked and therefofe when a final order passed by the Rent Controller in a case will be appealable and the aggrieved party would then have a right to get any error rectified the High Court will not interfere with an interlocutory order passed by this authority.

Bodhraj V. Gurcharandas, Civil Revn. No. 103 of 2010 D/- 10-2-54. AIR 1955 J&K 29 (H. C.) D. B.

Hindu Law — Applicability — to prevail in the State in respect of Hindus unless proved to have been modified by Custom applicable to the parties concerned.

In this State, the authority is furnished by the Sri Pratap Jammu & Kashmir Laws Consolidation Act, 1977, which shows that the ordinary Hindu Law should prevail, where the parties are Hindus, unless it is proved that it has been modified by custom applicable to the parties concerned. It is for the plaintiffs to prove the custom specifically. 2 J&K LR 186 (B. J. A.) followed.

Romella & Ors V. Bhagat Ram & Ors, Civil 2nd Appeal No. 263 6 J&K LR 17 (H. C.) D. B.

Hindu Law Inheritance (Amendment) Act (XVII of 1997) Section 3 (a) — Sister as heir — Word 'custom' used in the section explained — A custom in accordance with law not conceivable.

A usage, which is derogation of law, may in certain cases mature into a custom; but a usage in accordance with law can only be referred to the operation of law and cannot give rise to a custom.

Karam Chand V. Mst Nanki Devi, Civil Appeal No. 1 of 1947 — 6 J&K LR page 49 (Board of Judicial Advisers)

(Prior to the enactment of Hindu Law Inheritance (Amendment) Act, 1997, sisters were excluded by Hindu Law and a custom could not grow in accordance with law.)

Hindu Law — Joint family — Partition — Mother's share.

On partition of the joint family property by the sons after their father's death, widow is entitled to get a share equal to that of each of the sons, and if she has received any property either by gift or legacy from the father, she is entitled to so much only as with what she has already received would make her share equal to that of each of the sons. At the time of partition the widow should not be in a worse position merely because she has received stridhan from her husband or from her father-in-law.

Piara Lal V. Hirdey Nath & Ors. First Appeal No. 50 of 2007. D/- 15-12-1952. AIR 1953 J&K 9 (H. C.) D. B.

Hindu Law — Joint family — Partition — Evidence — Recitals in document.

Annoyed on account of his strained relations with his son who after the death of his mother had started living separately, if the father prepares a record in writing stating that certain properties were taken away by his son and that he was living separately from him, the mere recitals of this nature do not go to show that partition had been effected between members of a joint Hindu family.

Piara Lal V. Hirdey Nath & Ors. First Appeal No. 50 of 2007. D/- 15-12-1952. AIR 1953 J&K 9 (H. C.) D. B.

Hindu Law — Joint family property — Presumption.

Held that while a father and his sons in a Hindu family may be presumed to be joint there is no presumption that any particular property standing in the name of one of the members is joint family property, unless it is established that there was a nucleus of joint family property around which subsequent acquisitions could gather

AIR 1935 All. 303; 1926 Bom 408, 1930 Lah. 613, I. L. R. 25 Madras 149, AIR 1941 Lah. 447, 1942 Oudh 155: dissented from *Amar Nath Tiku & Ors V. Sh. Sonamali & Anr. Civil Appeal No. 4 of 1948. 8 J&K LR 92 (Board of Judicial Advisers)*

Hind Law — Joint Family — No presumption that Joint family is possessed of ancestral property.

It is well known rule of law that though there is a presumption that every Hindu family is normally joint, there is no presumption that such family is possessed of ancestral or joint family property or that any particular property is of that nature.

Pt. Janki Nath Applt. V. Sati Mali & Ors. Civil Appeal No. 24 of 1947. 6 J&K LR Page 138 (Board)

Hindu Law — Joint Family Property — Property purchased by the father in the name of his son and sale price paid by the former. — The property in question joint family property in the hands of the son.

The text of mitakshara is, "whatever else is acquired by the co-parcener himself without detriment to his father's estate or as a present from a friend or a gift at nuptials, does not appertain to the co-heirs, i. e. does not belong to the co-parceners." The text in express terms makes only such of the gifted property as self acquired as is gifted at naptials. The property gifted to a son by his father in any other manner would certainly be treated as ancestral property and not self-acquired. If it were the intention of the original law givers to make the property gifted by a father to his son as his (son's) self-acquired property there was nothing that could prevent them from recording this. Put what is found in the text is that only such property as is gified by a father to his son at the time of his marriage is saved from being treated as ancestral property, Besides this the pharase "without detriment to his father's estate" is significant enough. The gift by father to his son would be made by him from his own property, No gift can be made by a father to his son without detriment to his estate and no gift can be received by a son from his father or to be precise no property can be acquired by gift by a son from his father without detriment to his father's estate. Therefore the property gifted in the manner visualised above will be ancestral property in the hands of the son.

Kunj Lal V. Krishen Lal, Civil IInd Appeal No. 155 of 2004. (On Reference by Single Bench to a Division Bench) 4 J&K LR 251 & 254 (H. C.) D. B.

Hindu Law — Joint family — Separate property — Presumption — Evidence Act, (1872) S. 114.

It is true that there is no presumption under the Hindu Law that a joint family possesses joint property but if once it is proved or admitted that a family is joint and any member claims any portion of the property, the burden of proof lies on him to show that it was acquired by him in circumstances which would constitute it as his separate property, AIR (13) 1931 Lah. 419 : Rel. on.

Anno. Evidence Act, S. 114 No. 20

Lok Nath V. Rohlu Ram, First Appeal No. 29 of 2006, decided by the High Court on 19 Baisakh 2008. AIR 1951 J&K 25 (H. C.) D. B.

Hindu Law — Mitakshara School — Joint family—Partition—Partition consists in defining shares of coparceners — Actual division not necessary.

Under the Mitakshara School of Hindu Law, the portion of the joint estate consists in defining the shares of the co-parceners in the joint property and it is not necessary that there should be an actual division of property by mets and bounds. The definition of shares may be proved inter alia by an entry in the Record of Rights showing the share of each member of the family. Such an entry will be evidence of the severance of the joint status.

Nawaboo & Others V. Hari Chand, Civil 2nd Appeal No. 207 of 2003. 7 J&K LR 14 (H. C.) D. B.

Hindu Law — Widow — Alienation — Legal necessity — Mixed question of law and fact.

Held that the question whether legal necessity exists for a particular transfer made by a Hindu widow is a mixed question of law and fact and so is the finding of a Court in relation to the question of the legal necessity of a transfer. A Hindu widow is undoubtedly entitled to transfer property for her immediate maintenance but equally clear she is not entitled to anticipate her wants and to make provisions for her future maintenance by raising money by sale of property.

Badri Nath V. Basantu & Ors. Civil Appeal No, 9 of 1947. 7 J&K LR 213 (Board of Judicial Advisers)

Hindu Law — Widow — Death of Father-in-law — Mutation of property in name of widow of predeceased son along with two other sons — Possession of widow for more than twelve years — Title by adverse possession is complete—Presumption as to maintenance — (Limitation Act (1908), Art. 144) — (Evidence Act (1872), S. 114).

On the death of A the lands left by him were mutated in the name of his two sons B and C and the widow of a third son who had died during the lifetime of A. Along with B and C the widow also entered into possession of the land that was mutated in her name and retained it all along in her exclusive possession. Later on, the widow executed a will by which she bequeatted the property mutated in her name to B. After her death C brought the present suit on the ground that the widow being a Hindu widow could not alienate the property mutated in her name; he prayed a decree for 1/2 of the property mutated in widow's name.

Held (1) that according to Hindu law the wife of a predeceased son is not an heir of her father-in-law. All that she could claim in the family estate was maintenance'
1927 Oudh 138 rel. on.

(2) that according to Hindu law there was no presumption that 1/3rd share allotted to the widow on the death of her father-in-law was in lieu of her maintenance;
1949 All 458 rel. on.

(3) that there was no evidence to establish that the mutation was effected in the name of the widow as a mere consolation or in lieu of maintenance as a result of an arrangement arrived at between the heirs of A ard as such her possession started from the very beginning adversely to other heirs of A. 1955 All 630 and 1940 Oudh 269 Ref.

Hindu Law — Will — Parties Saroch Rajputs — A sonless Saroch Rajput can dispose of his ancestral property by will

Held that there is no custom amongst Saroch Rajputs that a sonless Saroch Rajput cannot will away his ancestral property without the consent of his collaterals.

Punjaboo & Anr V. Prithvi Singh & Ors. Civil First Appeal No. 28 of 2002. 7 J&K LR 4 (H. C.) D. B.

Hindu Law — Will by sale surviving coparcener to his widow and daughters — Plaintiff reversioner pleaded custom to the effect that sonless proprietor cannot will away the ancestral land in prosence of his collaterals and that daughters are excluded from inheritance by the collaterals of the last male-holder — Custom alleged by the plaintiff reversioner not proved.

Held that in the present case the last male-holder has done nothing to create a new estate or alter the line of succession allowed by law. If the divisor had introduced a course of succession unknown to Hindu Law, the dispossession by will would have been void. As pointed out above there was no restriction on the powers of alienation of the last male-holder who was the sole surviving coparcener to dispose of the property by will. The plaintiffs wanted to prove a custom by which such restrictions existed on the issueless proprieter. They failed to prove such custom and in the absence of any such custom the last male-holder was fully competent to will away his property in favour of his wife or his daughter. The plaintiffs could not challenge that alienation.
Chhaju Ram & Ors V. Smt. Vidya Devi & Ors. Civil First Appeal No. 23 of 2006. 8 J&K LR 186 (H. C.) Division Bench.

His Higheess Ailan No 23 of 12th Har, 1985 :- Its Urdu and English versions — The word 'Lavald' in Urdu version whether equivalent in meaning to words 'without heirs' in English version — Intention underlying the Ailan.

Held that the word 'Lavald' has been used loosely in Urdu version of the Ailan and the equivalent of this word (issueless) has not been used in the English version. The expression 'without heirs' used in the English version is undoubtedly more in accord with the intention underlying the Ailan that where under the law of inheritance a case of escheat arises High Highness will forego the right thus accruing to him in favour of the entire body of co-sharers. The Ailan was an act of grace to commemorate the happy occasion of his Coronation and it could not have been the intention of His Highness to deprive any one who, but for the Ailan, would have been entitled to inherit.
Rassia and Others Versus Pt. Lachmi Dass and Others. Civil Appeal No. 1 of 1948. 9 J&K LR 169 (Board)

Hoarding and Profiteering Prevention Ordinance (of 2000) — Section 14 — Sanction for prosecution with respect to particular FIR case — Difference in dates of offences not material.

In the First Information Report, 6th Jeth 2001 was mentioned as the date on which an indictable transaction was made by the accused. Sanction under section 14 was obtained with respect to this particular F. I. R. On investigation it transpired that the accused had committed offences of the nature contained in the F. I. R. on 13th and 14th Jeth and 3rd Har 2001 and this was represented in the challan before the trial Court. The offence was not found to have been committed on 6th Jeth 2001 and therefore the sanction was ineffective.

Held setting aside order of acquittal that the view taken by the trial Court was too narrow and the general provisions of the sanction cannot be restricted in such a limited way.
State Versus Arjan Dass. Acquittal Appeal No. 1 of 2003. 6 J&K LR page 71

Houses and Rents — J&K House Rent Control Order, R. 7, Proviso — Notice to quit — (T. P. Act (1882), S. 106).

Where "the local law to the contrary" provides six month" notice in place of 15 days' notice to be given by landlord to a tenant, for the latter's ejectment from the house, it does not releive the landlord from that condition which is provided by S. 136, T. P. Act and which is that the notice must expire with the end of the month of tenancy.
AIR 1923 Lah 659 ;

1938 Cal 656; 1943 Bom 306, Rel. on.
Anno. T. P. Act, S. 106 N. 40.
Vishwa Nath V. Bishen Dass, 2nd Appeal No. 42 of 2009 D/- 2-2-1956. AIR 1953 J&K 15 (H. C.) S. B

Houses and Rents - J&K Rent Control Act (Smt. 2009) — S. 21 — Court of Rent Controller amenable to the superintendence of the High Court.

Under S. 64 of J&K. Constitution Act read with S. 22 of the Letters Patent, the High Court has power of superintendence over Courts over which it has revisional or appellate jurisdiction. As S. 21 of the Houses and Shops Rent Control Act, 2009, Sub-s. (5) empowers the High Court to hear revisions from an order of the District Judge passed in appeal against the order of the Controller it can exercise superintendence over the Court of the Controller as well.

The power of superintendence should be exercised very sparingly and only in those cases where a party is likely to suffer irreparable damage in case an order of the Court is allowed to stand. When there is another remedy open to a party the power of superintendence of the High Court cannot ordinarily be invoked and therefore when a final order passed by the Rent Controller in a case will be appealable and the aggrieved party would then have a right to get any error rectified the High Court will not interfere with an interlocutory order passed by this authority.
Badhraj V. Gurcharandas, Civil Revn. No. 103 of 2010 D/- 10-2-54. AIR 1955 J&K 29 (H. C.) D. B.

House Rent Control Order, 2000 — Clauses 7 & 13 — Clause 13 amended after filing of the suit and drawing up of the issues but before the decree — Amendment not retrospective.

Held that suits which are declaratory or explanatory or procedural may be construed to be retrospective, but ordinarily no other statute is to be construed to be retrospective unless it expressly or impliedly says so. On the contrary a Statute which affects vested rights is ordinarily presumed not to be retrospective. It may further be stated that the House Rent Control Order by its very nature connot be retrospective unless it is expressly so stated.
Th. Harison Club V. Mr Krishen Gopal, Civil IInd Appeal No. 157. of 2003. 7 J&K LR 113 (H. C.) D. B.

House Rent Control Order, 2000. Ejectment suit—Interpretation of clauses 7 and 13.

The Order contains certain clauses which apply when a fair rent has been determined by the Controller and certain other clauses which apply generally to all tenants irrespective of the determination of the fair rent by the Controller and the view that when a fair rent has not been determined the Order as a whole cannot apply and case is governed by Transfer of Property Act, cannot be legally sustained.

The protection given to a tenant under clause 7 (1) of the House Rent Control Order can only apply "when the Controller has determined the fair rent of a house in accordance with the procedure. The protection given to a tenat under clause 7 (2) is a general one and applies to all classes of tenants irrespective of the fact whether their fair renthas been determined or not. But clause 7 (2) only gives a power to the Court to correct a previous order of

ejectment and to make it in accordance with the Order and it has no application to the present case where there is no question of recalling a previous order of ejectment but where the question is whether an order for ejectment for the first time should or should not be made.

Clause 13 of the Order is expressed in general terms and applies to all tenants occupying a house irrespective of the fact whether a fair rent with regard to the lease has or has not been determined by the Controller. This clause is expressly "subject to the provisions of the Order which includes subject to clause 7 including its provisos. Therefore, not by virtue of clause 7 but by virtue of clause 13 the proviso to clause 7 becomes a part of clause 13. And clause 13 in any given case has not to be read subject to the proviso in clause 7.

Sh. Mohd. Din Defdt. Appeliant Versus Sh. Ghulam Rasol (Pltff. Respdtt). Civil Appeal No. 25 of 1947. 3 J&K LR page 106 (Board of Judicial Advisers)

Income Tax Act (IX of 1991)

Section 62 — Reference to the High Court on the points whether the Income Tax Commissioner can issue a notice under section 35 of the Act or not and whether onus of proof lies on the assessee to show that a particular bank deposit is not an income liable to tax.

Held that it would be rediculous if it were held that the moment the Income-tax Commissioner passes an order deciding the appeal, he cannot retify any mistake which is apparent on the record. But there is no provision under section 35 to issue a notice to the assessee. There was such a provision in the old Act which has been amended and in the amended Act no such provision exists. Under these circumstances our answer to the first question is in the negative, that is, under section 35 the Income-tax Commissioner to whom the appeal is transferred under section 32 of the Incoome-tax Act and proceeds with that appeal under section 33 has no powers to issue a notice to the assessee to show cause as to why the assessment may not be enhanced.

Fur her held that the answer to the second question is that if the Income-tax authorities have shown that the deposits made in the bank on behalf of the assessees are income of the assessee then the onus lies the assessee to explain to the satisfaction of the assessing officer that a particular deposit —is not an income liable to tax.

R. C. Mahatta V. Income Tax Department Reference U/s 62 (2) of the Incoma Tax Act, 8 J&K LR 138 (H. C.) D. B.

Income Tax Act (IX of 1991) - Section 10 (2) (ix) — Bonus paid to Labour — Whether in the circumstances of the case in computing the assessee's income from business the payments of Rs. 5,500 and Rs. 32,000 as bonus paid to the labour and the staff of the assessee in the assessment year 2000 and 2001 (accounting years ending June 1943 and 144 respectively) are allowed as items of expenditure under section 10 (2) (ix) of the Income Tax Act, 1991 or under any other provisions thereof.

Held that in the circumstances of the present case it must be held that these sums are not ordinarily bonus but under the rules enforced by the authorities they are treated as part of the cost of production. This being the case it must be held as a matter of law that the payments of Rs. 5, 500 and Rs. 32, 000 as

bonus paid to the labour and the staff in the assessment years 2000 and; 2001 shou'd be treated as expenditure incurred solely for the purpose of earning profits and gains and therefore liable to be allowed under clause (ix) of section 10 (2) of the Income Tax Act.

Shri Karan Singh Woolen Mills Ltd Versus Income Tax Department Income Tax Reference No. 1 of 2003. 7 J&K LR 134 (H. C.) D. B.

Indian Independence Act of 1947 — the constitutional relationship between J&K State and the British Crown before the partition of India how affected by Indian Independence Act.

Previous to the partition there was no doubt that the Ruler of the Jammu and Kashmir State was under the suzerainty of the British Crown inasmuch as foreign relations were under the exclusive control of the Crown representative. But in so far as the internal sovereginty of the Ruler was concerned it was absoiutely unlimited and there were no fetters on it. In this connection it would be relevant to reproduce Sections 4 and 5 of the Jammu and Kashmir Constitution Act. 1996 as they stood before the Act was amended in November 1951 :

These provisions made it crystal clear that the territories comprised in the State of Jammu and Kashmir were vested in His Highness and governed by and in his name and all rights, authority and jurisdiction appertaining or incidental to the government of these territories was exercisable by His Highness except in so far as was otherwise provided under the Act or as it might otherwise be directed by him. Despite the fact that under the Act Legislative Assembly, i. e, Praja Sabha, had been set up with ceriain circumscribed powers, all legislative, executive and judicial powers of His Highness in relation to the State and its Gove nment were declared to be or to have always been inherent in and possessed by His Highness In view of these clear provisions it is futile to argue that High Highness' powers to do what he pleased in relation to the State could be seriously questioned. So far as the internal sovereignty of the State was concerned the powers of the Ruler were similar to those of the British parliament.

While the Maharaja of Kashmir was under the Paramountcy of the British Crown before the partition of India from 15-8-1947 under section 7, Indian Independence Act (10 and 11 Geo VI Ch. 30) passed by the British Parliament Suzerainty of His Majesty over the Indian States lapsed and all fui ctions exercisable by His Majesty at that date with respect to the State of Jammu and Kashmir all obligations of His Majesty towards the Jammu and Kashmir State or the ruler thereof and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in relation to the State of Jammu and Kashmir be treaty or otherwise lapsed and the State became an independent and sovereign State in the full sense of the International Law. Thus what ever limits to the sovereignty of His Highness in relation to matters coming within the sphere of paramountcy existed before 15- 8- 1947, these ceased to exist and His Highness because an uncotrolled and absolute sovereign even in relation to such spheres from that.

Maghar Singh & Ors V/s Principal Secretary J&K Govt. 1st appeals No. 29 of 2008 and Nc. 4 of 2009 D/- 25-3-1954. AIR 1953 J&K 25 (H. C.) D. B.

Indian Independence (Legal Proceedings) Order (1947) S. 4 —

Execution pending on appointed day — Jurisdiction of Court to continue execution.

Before partition there was a reciprocity between the Courts in British India and the State Courts and the decrees were executed by the Courtsin British India and 'vice versa'. At the time when the decree was passed by Lyallpur Court, it was executable by the State Court. But after the partition which came about in the year 2004 Lyallpur Court became a foreign Caurt. If the proceedings are iniitated for the first time on a day after 15th August 1947 in an Indlan Court for the execution of a decree passed by a foreign Court, at a time when that foreign court was not a foreign Court, the execution could not be taken out in that Court. But if the execution proceedings were pending on the appointed day i. e. 15th August 1947 in any Court in India that Court would continue to have jurisdiction in that matter irrespective of the fact that certain new relations had come into existence between India and Pakistan. Where the execution app'ication was consigned to records for default of appearance on 19th Bhadon 2004, that is to say much after 15th August 1947 (31st Sawan 2004) the Court at Jammu would continue to have jurisdiction in the matter irrespective of the fact as to whether Lyallpur Court became a foreign court or not.

AIR 1951 Simla 255, Rel. on.

Hiranand V. Jyoti Ram Goel, 1st Appeal No. 6 of 2008 D/- 1st Chet 2008. AIR 1952 J&K 31 (H. C.) D. B.

Inherent powers of a Court —

Inherent powers of a Court cannot be invoked where the code has made an express provision — There should be no resort to inherent power when there are other remedies available.

Hardatt Raina V. Tej Ram, Cr Misc. Appeal No. 90 of 2005. 7 J&K LR 56 (H. C.) Single Bench.

Inherent power of court — whether can be exercised for amending decree not in conformity with the judgment

Appellate decree of District Judge not in conformity with his judgment — Execution case coming before him in appeal — District Judge interpreting judgment but not bringing decree in conformity with it — District Judge held should have brought the decree in conformity with the judgment in exercise of his inherent jurisdiction.

Anno. Civil P. C. S. 151 N. 2; S. 152 N. 6.

Raja Sahib of Poonch V. Kirpa Ram, Civil Appeal No. 3 of 1951 D/- 19-8-1952. AIR 1954 J&K 23 (Board of Jvdicial Advisers)

Instrument of Accession — executed by His Highness on 26th October 1947 — how affected the relationship between J&K State and India — residuary sovereignty not affected.

Now let us examine what was the effect of the execution of the Instrument of Accession by His Highness cn 26- 10- 1947. This Instrument of Accession which was executed by the Ruler of the independent and sovereign State of Jammu and Kashmir was executed by him under Section 6, Government of India Act 1935, as adapted by the Indian (Provisional Constitution) Order. 1947. By executing this Instrument of Accession the Ruler on behalf of the State acceded to the Dominion of India with the object that certain authorities specified in Section 6 (1) (a)' shall, by virtue of the Instrument of Accession, but subject always to the terms thereof', and for the purposes only of the Dominion, exercise in relation

to the State such functions as would be vested in them by or under the Act. It is clear that even if the Instrument of Accession had not made any specific reservations therein, the instrument read with section 6, Government of India Act would leave the residuary sovereignty of the State entirely unaffected. But the Instrument of Accession does not leave the important matter to be determined by implication alone. Clause 8 of the Instrument of Accession runs as follows: "8. Nothing in this Instrument affects the continunance of my sovereignty in and over the State, or, save as provided by or under this Instrument, the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State."

In view of this clear and express reservation we see that no change whatsoever was affected in the residuary sovereignty of the State or the power of its Ruler so far as the accession of the State to the Dominion of India was concerned.

Maghar Singh & Ors V. Principal Secretary J&K Govt. 1st appeals No. 29 of 2008 and 4 of 2009 D/- 25-3-1953. AIR 1953 J&K 26 (H, C.) D. B.

Intention — Cheating — What is not — a breach of faith, a betrayal of confidence, moral indignation not criminal intention to prove offence of cheating.

Where a complaint of an offence of cheating is made on the ground that the accused has entered into a contract with the complainant to work for the latter and that he had not commenced work in spite of complainant making two payments as agreed, the complainant has to establish a preconceived intention on the part of the accused of not carrying out the terms of the agreement. Such an intention cannot be presumed from the mere receipt of money and not working subsequently according to the terms of the agreement. Mere receipt of money would not be cheating unless it is shown that it was received with the preconceived intertion of denying it later on. If the intention is changed subsequently it would not be cheating. 159 Ind Cas 167 (1) (Pat) and AIR 1923 Lah 621, Rel. on.

The mere transaction may amount to a breach of contract, might involve a breach of faith, a betrayal of confidence, and might arouse moral indignation. But that would not convert it into a criminal offence. AIR 1938 Mad 129 Rel. on.

Anno I; P. C; S. 420 N. 4, 11.

Devia Ram & Anr V. L. Ram Chand, Appln. No. 105 of 2009 D/- 25-3-1953. AIR 1953 J&K 22 (H. C.) S. B.

Interloctory order — of the Court of Rent Controller — not liable to be interfered with by the High Court in exercise of its power of superintendence under S. 22 of the Letters Patent read with S. 64 of the J&K Constitution Act 1996.

Order S. 64 of the J&K Constitution Act read with S. 22 of the Letters Patent, the High Court has power of superintendence over Courts over which it has revisional or appellate jurisdiction. As S. 21 of the Houses and Shops Rent Control Act: 2009, Sub-s. (5) empowers the High Court to hear revisions from an order of the District Judge passed in appeal agaist the order of the Controller it can exercise superintendence over the Court of the Controller as well.

The power of superintendence should be exercised very sparingly and only in those cases where a party is likely to suffer irrepairable

damage in case an order of the Court is allowed to stand. When there is another remedy open to a party the power of superintendence of the High Court cannot ordinarily be invoked and therefore when a final order passed by the Rent Controller in a case will be appealable and the aggrieved party would then have a right to get any error rectified, the High Court will not interfere with an interlocutory order passed by this authority.
Bodhraj V. Gurcharandas, Civil Revn. No. 103 of 2010 D/- 10-2-44. AIR 1955 J&K 29 (H. C.) D. B.

Interpretotion — Dukhtar Khana Nishin

A custom should be proved to be ancient, uniform and continuous. It has been pointed out so many times that the pleading of a custom may not be presumed in every case and that it hos to be definitely set forth and pleaded. In cases where a certain customs are very well-known and found to be generally in vogue this rule of pleading may be relaxed. In the District of Mathum the custom of a resident daughter inheriting her father's property in the same manner as a son, is not at all in vogue and is never known to have been followed. The term "Dukhtar Khana Nishin" should, therefore, be interpreted in its natural meaning and not in the sense it has been scquired in Kashmir Valley in view of the custom prevailing there.
Mst. Jevant V. Ramanand, Civil 2nd Appeal No. 22 of 2003. 7 J&K LR 10 (H. C.) Single Bench

Interpretation — "Except in so far as may be otherwise provided by or under this Act" as used in S. 4 (2) of the J&K Constitution Act, 1996 as amend in 2008 and 2009.

Per Shahmiri, J.: The powers of superintendence, direction and control of the Civil Administration and the Government vested in the Council are exercisable by them in so far as these may be construed to fall within the words "except in so far as may be otherwise provided by or under this Act" as used in S. 4 (2) of the Act.
M. Sultan & Ors V. State, Cr. Misc. Applns Nos. 38 to 40, 42, 44 to 48 and 51 of 1955 D/- 2-8-1955. AIR 1955 J&K 1 (H. C.) F.B.

Interpretation — "Exceptions" as used in Article 370 (1) (d) — Whether includes mere omissions.

Article 370 of the Constitution gives powers to the president to select certain articles and apply them to the State of Jammu and Kashmir and he may omit the application of other articles. The chief power which vests in the President is to omit certain articles. Having applied some of the articles he may except or modify them. When the President says that he applies a certain article but does not exercise the power of exception which is granted to him but he is exercising the power o omission.

The power of exception is exercised when he applies an article as a whole or as a part excepting a particular thing, a person or a place from its operation. If the power to except meant merely the power to omit an article from application it was not necessary to use that word because the Constitution Assembly simply had to say as it has said that the President may apply such articles as he thinks fit. The use of word "exceptions" shows that there was something more which the President could do beyond the power to omit.
M. Subhan & Ors V. State, Cr. Misc. Appln. Nos. 38 to 40.

42, 44 to 48 and 51 of 1955 D/- 2- 8- 1955. AIR 1956 J&K 1 (H. C.) F. B.

Interpretation. 'Exceptions' and Modification's as used in Sub-cl. (d) of cl. (1) of Art. 370 Constitution of India – interpretted independantly of the meanings attached to these as used in other provisions of the Constitution -- Art. 370—a self contained provision.

In order to interpret the words 'exception' and 'modifications', as used in sub-cl. (d) of cl. (1) of Art. 370 of the Constitution, the Court cannot derive much help by comparing meanings attached to these words, as used in other provisions of the Constitution. The policy underlying Art. 370 of the Constitution is apparent from the aricle itself. The very fact that this article begins with the words 'Notwithstanding anything in this Constitution' shows that it is a self-contained provision and has a specific purpose of its own.

M. Subhan & Ors V. State, Cr. Misc. Applns. Nos. 38 to 40, 42, 44 to 48 and 51 of 1955 D/- 2-8-1955. AIR 1956 J&K 1 (H C.) F. B.

Interpretation — 'Modification' as used in Art. 370 (1) (d) Constitution of India — Whether provisions of Art. 351 (c) covered by the word 'Modification'.

While in general the word "modification" has been interpreted to mean 'tone down, soften rigorous of, assuage or to limit,' it has also been interpreted in the sense of enlarging the scope of the previous Act.

And as the essential purpose of Art. 370 is to be ascertained from the article itself rather than by travelling beyond its scope and determining what the policy behind the different provisions of the Constitution contained in its different part is, the provision contained in cl. (c) added to Art. 35 but the President is covered by the term "modification" as used in Art. 370 (1) (d) of the Constitution.

M. Subhan & Ors V. State, Cr. Misc. applns. Nos. 38 to 40. 42 44 to 48 and 51 of 1955 D/- 2-8-1955. AIR 1956 J&K 1 (H. C.) F.B.

Interpretation of clauses 7 and 13 — House Rent Control Order 2000.

The Oder contains certain clauses which apply when a fair rent has been determined by the Controller and certain other clauses which apply generally to all tenants irrespective of the determination of the fair rent by the Controller and the view that when a fair rent has not been determined the Order as a whole cannot apply and case is governed by Transfer of Property Act, cannot be legally sustained.

The protection given to a tenant under clause 7 (1) of the House Rent Control Order can only apply 'when the Controller has determined the fair rent of a house in accordance with the procedure. The protection given to a tenant under clause 7 (2) is a general one and applies to all classes of tenants irrespective of the fact whether their fair rent has been determined or not. But clause 7 (2) only gives a power to the Court to correct a previous order of ejectment and to make it in accordance with the Order and it has no application to the present case where there is no question of recalling a previous order of ejectment but where the question is whether an order for ejectment for the first time should or shoud not be made.

Clause 13 of the Order is expressed in general terms and

applies to all tenants occupying a house irrespective of the fact whether a fair rent with regard to the lease has or has not been determined by the Controller. This clause is expressly "subject to the proviiions of the Order which includes subject to clause 7 including its provisos. Therefore, not by virtue of clause 7 but by virtue of clause 13 the proviso to clause 7 becomes a part of clause 13. And clause 13 in any given case has not to be read subject to the proviso in clause 7.

Sh. Mohd Din Defdt. Appellant Versus Sh. Ghulam Ras (Pltff. Respdtt) Civil Appeal No. 25 of 1947. 6 J&K LR page 106 (Board of Judicial Advisers)

Interpretation — of "temporarily" in S. 2 (1) Explanation (a) of J&K Agriculturists, Relief Act (I of 1938)

"Temporarily" in no case would mean a number of years. *Niranjan Nath V. Kailas Kaulla & Anr. Civil original suit No. 14 of 2008 D/- 28-5-1953. AIR 1954 J&K 6 (H. C.) S. B.*

Interpretation — of the word "enter" occurring in para (a) of S. 108—A, Cr. Procedure Code — Whether can be construed in the light of the explanation to S. 442 of the Ranbir Penal Code.

The term "enter" should be construed along with the words immediately following i. e: "reside or remain." These words provide the clue to the meaning of the word "enter". A reasonable interpretation of the term "enter" obviously would be that the entry must be for the purpses of remaining or residing and not only the physical act connected by the dictionary meaning of the word.

The term "enter" occurring in para (a) of section 108 - A cannot be construed in the light of the Explanation to section 442 of the Ranbir Penal Code.

In the absence of the prosecution proving to the contrary the fact, that the road was under the management and control of the Public Works Deparment of His Highness' Government was sufficient to give rise to the presumption that it belonged to the Jammu and Kashmir State and not to the Jagir of Chenani. The fact of it being situate within the boundaries of the Chenani Jagir would not make much of a difference in the case of a public high-way.

Jagan Nath V. State, Revision Cases No. 70 and 71 of 2003. 6 J&K LR page 31 (H. C.) S. B.

Interpretation — Proclamation of 20-11-1949 by Yuvraj.

The words in the Proclamation of 26- 11- 1949 by the Yuraj that "the provisions of the said Indian Constitution shall, as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State" can only be interpreted to mean such provisions of the Constitution as are really applicable to the situation which were not and could not be applied to the State in accordance with the letter and spirit of Art. 370.

Maghar Singh & Ors V. Principal Secy J&K Govt. 1st appeal No. 9 of 2008 and 4 of 2009 D/- 25-3-1953. AIR 1953 J&K 26 (H. C.) D. B.

Yuvraj — powers of — Applicability of Fundamental Rights in the Indian Constitution to the State of J&K.

The Yuvrraj could make an Act inconsistent with Part III of the Constitution relating to Fundamental Rights. The Chapter on Fudamental Rights does not apply to the State of J & K and no Act made by the Yuvraj can be questioned on this ground.

Maglar Singh & Ors V. Principal Secy J&K Government, 1st appeals No. 9 of 2008 and 4 of 2009 D/- 25-3-53. AIR 1953 J&K 26 (H. C.) D. B.

Interpretation — responsibility of — ultimately resting on the Civil Court — His Highness in interpreting the terms of grant purporting to confer proprietory rights — On the recommendations made not exercising the jurisdiction of a civil court in interpreting the terms of grant.

The responsibility of interpreting the terms of a grant ultimately rests upon the civil Court and it is not possible to regard His Highness in interpreting the terms of grant as exercising the jurisdiction of a Civil Court.

The resposibility of making a Crown grant rests upon the the Government or upon His Highness in exercise of his governental functions. And it is not within the province of Revenue and Settlement authorities to make Crown grants or to dispose of Crown rights and privileges in land.

The entry of proprietary interest in Revenue records is good enough for revenue purposes but it is not sufficient by its own force to create or extinguish proprietary rights in persons affected by the entry. And the order of removal of a man's name from proprietary coloumn of revenue records even when accompanied by a consenting statement does not divest him of his proprietary interest in the land unless it is possible to found a valid grant upon the consenting statement.

No doubt His Highness is vested with a sovereign jurisdiction in all matters relating to the State but it ls open to him to separate his jurisdiction in several matters and to exercise it separately. And it is a question of fact in each case what particular jurisdiction he is exercising.

Bhagtu & Others Versus Wazir Moti Ram & Other, Piaroo & Others Versus Wazir Moti Ram And Others. Civil Appeals Nos. 11 & 12 of 1950. 9 J&K LR 128 (Board).

Interpretation of Statutes — Duty of Court

The Courts have got only to see that the law should be administered as it is and not as it should have been.

Anno. C. P. C; Pre N. 7

Gh. Nabi Jan V. State' Misc. Criminal Case No. 109 cf 2010 D/- 28-7-1953. AIR 1954 J&K 7 (H. C.) D. B.

Interpretat of Statutes—Duty of Court—(Civil P. C. 1908 Preamable).

The Courts have to administer the law as it is and not to declare as to what the law should be.

Anno. Civil P. C. Pre. N. 7.

G. A. Ashai V. State, Cr. Misc. Appln. No. 4 of 2010 D/-22-7-1954. AIR 1954 J&K 59 (H. C.) F. B.

Interpretation of Statutes — Intention of Legislature –Not relevant–

Whatever may have been the intention of the legislature in passing a certain legislation, the Court is to be guided not by what the legislature had in mind, but what they have expressed in cold print.

Anno. Civil P. C. Pre. No. 7.

Qadir Chhandu V. State, Cr Revn. No. 87 of 2006 D/- 13 Har 2007 AIR 1952 J&K 46 (H. C.) S. B.

Interpretation of statute — presumption regarding constitutionality of a statute

No statuate can be held invalid on the ground that it is opposed to the spirit of the Constitution. Whether an Act is

ultra vires or not has to be seen with reference to the provision of the Constitution alone and nothing else. It is a fundamental rule of interpretation of statutes that there snould always be a leaning towards holding a statute as constitutional and intra vires. AIR 1951 All 476 (FB) and 1950 SC 27, Rel. on.
G. A. Ashai V. State, Cr. Misc. Appln, No. 4 of 2010, D/- 22- 7- 1954. AIR 1954 J&K 59 (H. C.) F, B.

Interpretation—Section 4 and 5 of the Constitution Act, with reference to the power of the Head of the Administration appointed by His Highness, during emergency to issue an Ordinance.

Held that S. 19 of the Preventive Detention Act cannot be said to be ultra vires of the Constitution on the ground that it is not in accordance with the spirit of the Constitution.

Held that under section 4 of the Constitution Act, His Highness can suspend the constitution or replace the existing administrative machinery by a different Agency altogether. Under section 5 of the Constitution Act, His Highness can pass any orders and ordinances on his own motion. Obviously then, the Head of the Administration has been appointed in exercise of his inherent authority and powers saved by sections 4 and 5 of the Constitution Act. Therefore, the moment the Head of the Administration was appointed with powers to deal with emergency he must be presumed to have been invested with authority and jurisdiction which appertain to or are incidental to the Admistration of the Jammu and Kashmir State during the period of emergency. This would certainly give fullest authority to the Head of the Administration to pass orders and ordinances incidental to the administration of the State. The powers of the Head of the Administration not having been defined in the order of appointment a general de egation of all powers — executive and legislative have to be presumed which are necessary for deeling with the emergency.

Further held that there is an assumption in favour of the legality of a Statute and a Statute should not be he'd to be unconstitutional or ultra vires unless it is clearly repugnent to the Constitution. Whatheve1 doubts one may have entertained as regards validity of the said ordinance must be completely set at rest after the confirmation of His Highness. It is an elementary principle of law that every ratification back to and is equal to a prior command. AIR 1943 Nag. 36, 1940 All. 272 (FB), 1936 Cal. 87 followed.
Rehman Kenu V. Razak Lawai & Anr. Civil Revision No. 2 of 2005, 7 J&K LR 170 (H. C.) Single Bench.

Interpretation of Statutes – Statutes affecting liberty of subject.

Two constructions of a provision of law would mean that the provision of law is of a doubtful meaning. The benefit of doubt must always go to the person on whose liberty an inroad has been made without trial.
Anno. C. P. C., Pre. N. 7.
Gh. Nabi Jan V. State, Misc. Cr. Case No. 109 of 2010 D/- 28-7-1953. AIR 1954 J&K 7 (H. C.) D. B.

Interpretation "such decrees" in section 26 (2) Land Alienation Act (V of 1999).

Held that the expression "such decrees" in section 26 (2) means the particular decree which is in question and if an appeal would not lie from the particular decree by reason of the fact that it was consent decree and therefore not appealable under C. P. C. then it is a case in which the application for revision would lie not to the District Judge but to the High Court.

AIR 1937 Lah. 33 followed.
Chief Revenue Officer Poonch V/s Illahi Bux & Anr. Civil Revisions Nos. 45, 46 & 47 of 2004. 7 J&K LR 118 (H. C.) D. B.

Interpretation of Statutes — Word 'amount' in S. 29 (4) of J&K Distressed Debtors Relief Act (16 of 2006). — if can be construed ejusdem generis with debt —

The word 'amount' in Section 29 cannot be construed 'ejusdem generis' with the word 'debt'. Unless there is a genus of category there is no room for the application of 'ejusdem generis' doctrine.
Degambar Sain V. Pt Lachhman Dass, Ref. No. 1 of 1951. AIR 1952 J&K 7 (Board of Judicial Adyisers)

Interpretation — Word not defined in a statute — Dictionary meaning to be resorted to.

The word 'trade' has not been defined in the Distressed Debtors' Relief Act. The only course open therefore is to go to the dictionary meaning of the word 'trade', which is given as buying and selling of commodities. Where, therefore, A agrees to supply B a certain number of bamboo sticks and receives for that purpose a certain advance of money from B, the advance is made for the purpose of trade and hence does not constitute a debt within the meaning of the Act.
AIR 1945 All. 277 reld. on.
Gulzari Lal V. Karam Chand, Case No. 44 of 2007. D/- 18 Jeth 2008. AIR 1951 J&K LR 17 (H. C.) D. B.

Investigation — induction of approvers as a short cut — practice deprecated.

Held that the evidence of such an approver is of no value whatever.

The Board have had cases constantly coming up before them in which the police showed too pronounced a tendency to simplify matters by introducing an approver. In the majority of such cases the approver's evidence is unreliable and the High Court naturally approaches his evidence with extreme caution. The police will be well advisod to refrain from adopting such short cuts and to confine themselves to such evidence as may be likely to appeal to a Court of law.
Qadir Gujar V. State, Cr. Appeal No. 2 of 1947 – 6 J&K LR page 87 (Board of Judicial Advisers)

Investigation — cognizable offence — by police officer not in charge of police station — curable irregularity.

Sub-section (2) of section 156 Criminal Procedure Code lays down that' no proceedings of a police officer in any such case shall at any stage be called in question on the gound that the case was one which such officer was not empowered under this section to investigate." As a matter of fact a conviction or an acquittal does not depend upon the question as to which particular officer actually conducted the investigation which resulted in the trial. That is to be determined mainly on the basis of the evidence that is tendered at the trial. A trial cannot be impunged on the ground of such an irregularity.

A. I. R. 1931 Patna 151, A. I. R. 1928 Bom. 162 and A.I.R. 1944 P. C. 73 referred to.
Ghulam Nabi Bazaz & Others Versus State. Criminal Revision No. 28 of 2006, 9 J&K LR 18 (H. C.) Single Bench.

Jammu and Kashmir Big Landed Estates (Abolition) Act (2007),

Preamble, Ss. 4 (4), 5 (5), 20, 26 and 35 — Act is not ultra vires the legislative powers of the Yuvraj - Jammu and Kashmir Constitution Act (1996), Ss. 4, 5, 72 — S. 5 is not abrogated by Proclamation of Yuvraj — Constitution of India, Arts. 370, 384, 254 and Part III-Applicability to Jammu and Kashmir — Repugnancy with Jammu and Kashmir Land Acquisition (10 of 1996), S. 6.

Jammu & Kashmir Big Landed Estates (Abolition) Act (2007) is not ultra vires of the powers of Shree Yuvraj nor is it open to review by the Courts.

His Highness the Maharaja of Jammu and Kashmir's legislative, executive and judicial Powers in relation to the State were not limited in the sphere outside the matters assigned to the Union. He could entrust all his rights and authority under Ss. 4 and 5 of the Jammu and Kashmir Constitution Act 1996 to any person whom he liked even to the extent of effacing himself altogether as the British Parliament can do and his proclamation dated 7th Har 2006 published in Extraordinary Gazette dated 20- 6- 1949 entrusting these powers to Yuvraj was perfectly valid and constitutional.

(Short background of the constitutional relationship that existed between the Jammu and Kashmir State and the British Crown before the partition of India and how it was affected by the Indian Independence Act of 1947 and by the subsequent execution of the Instrument of Accession by His Highness on the 26 th October 1947, traced).

(Effect of Art 370, Constitution of India in relation to the State of Jammu and Kashmir indicated).

A Legislature whose powers are circumscribed by the superior authority which has created it can exercise legislative powers of the same nature as the superior authority itself and cannot be treated as its delegate or agent. Consequently, it cannot be contended that the Yuvraj, to whom full and plenary powers of legislation had been given by a sovereign authority which could do anything it pleased, was an agent or delegate of that sovereign authority and that there are any checks or restraints on his power. Therefore the Yuvraj is fully competent to exercise powers under S. 5 of the Jammu and Kashmir Constitution Act, 1996.

Article 385 does not in terms apply to the State of Jammu and Kashmir. It may also be observed that under Art. 370 only such provisions of the Constitution could be declared by the President, in consultation with the State Government to apply to the State of Jammu and Kashmir as related to matters specified in the Instrument of Accession.

The Article has not been specifically excluded from the Schedule to the Constitution (Application to J&K). Order 1950 only through an oversight or inadvertence.

The State Constitution Act is clearly saved under clause 8 of the Instrument of Accession and it remains materially unaffected by Art. 370 of the Indian Constitution.

The words in the Proclamation of 26- 11- 1949 by the Yuvraj that "the provisions of the said Indian Constitution shall, as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State" can only be interpreted to mean such provisions of the Constitution as are really applicable to the State and not those provisions of the Constitution which were not and

could not be applied to the State in accordance with the letter and spirit of Art. 370.

The Yuvraj could make an Act inconsistent with Part III of the Constitution relatfng to Fundamental Rights. The Chapter on Fundamental Rights does not apply to the State of Jammu and Kashmir and no Act made by the Yuvraj can be questioned on this ground. In fact no legislation made by the Yuvraj outside the matters within the competence of Parliment can form the subject matter of review in a Court of law just as no Act of British Parliament could be declared ultra vires by any Court.

Consequently, S. 5, Jammu and Kashmir Constitution Act, 1996 is neither abrogated nor superseded by the provisions of the Indian Constitution, by virtue of the Proclamation of 26-11-1449.

The provisions contained in the J. & K. Big Landed Estates (Abolition) Act do not relate to the acquisition of property for the State or for any other public purpose. They ordain extinguishment of the rights of the landlord, in the manner set forth in S. 4 of the Act and, therefore, these are not in conflict with S. 6, J. & K. Land Acquisition Act.

Even assuming that there is some clash between these Acts, Art. 254 of the Constitution cannot be invoked for the purpose. Article 254 is not really applicable to the State of Jammu and Kashmir. The condition precedent for the effective application of Art. 254 is that it should relate to a provision of law in the concurrent list with respect to which Parliment has power to make laws for the State. In the absence of such power and in the absence of the application of List III of the Seventh Schedule to the State the question of any provision of law made by the State Legislature being repugnant to any provisions of a law made by parliament which parliament is not competent to enact for the State or to any existing law does not arise and the J&K Big Landed Estates (Abolition) Act cannot be held ultra vires of the powers of Yuvraj on this ground.

There is nothing whatsoever in the Jammu and Kashmir Constitution Act, 1996 which limits the legislative power of the Ruler or the Yuvraj within the residuary sovereignty of the State The Jammu & Kashmir Constitution Act, 1996 did not lay down any Fundamental Rights which cou'd not be abridged or taken away by the soveresgn legislature, i. e: the Ruler or the Yuvraj and his powers of Legislation are as wide and as plenary as those of the British Parliament and they cannot form the subject matter of judicial review, nor can they be impunded on any such ground as non-payment of compensation.

Since the Yuvraj was not the delegate of His Highness and had as full and as plenary powers as His Highness himself and, therefore, he could make any law in the State, he could also delegate his powers of legislation to any person or body whom he thought fit to do so.

Even then the delegations made in most of the provisions of the Big Landed Estates (Abolition) Act, (SS. 4 (4): 5 (5): 20 and 35) relate to matters of detail permissible even under the Supreme Court ruling AIR 1951 SC 332 and do not part with essential legislative functions, namely, legislative policy and its formulation as a rule of conduct. Such delegation is perfectly valid.

But these restrictions which are implicit in the Constitution of India do not apply to the Ruler of the Jammu and Kashmir State who enjoyed full residuary sovereignty.

Section 26 of the Act, however, stands on a slightly different footing. Here the question of award of compensation has been left to be settled by the Constituent Assembly which could not be regarded as a subordinate authority. There was nothing wrong in leaving the decision of the question of payment of compensation to the expropriated landlords to a body which was to be convened for the purpose of drawing up the Constitution of the State.
Magher Singh & Ors. V. Principal Secretary J&K Govt. First Appeal No. 29 of 2008 and First appeal N0. 4 of 2009 D/- 25- 3- 1953, AIR 1953 J&K 26 (H. C.) D. B.

(Jammu and Kashmir) Civil P. C. (10 of 1977) S. 60 (1), (c2), 0.34, R. 4 — Mortgage Debt — Decree in terms of Agriculturists Relief Act — Default in payment — Final decree for sale not barred—(Debt Laws—Jammu and Kashmir Agriculturists' Relief Act (1 of Sm. 1983, S. 11) — (Civil P. C. (1908), 0.34 R. 5) — AIR 1941 Pesh 53 and AIR 1937 Lah 194, Not followed.

If a mortgage is valid. it must be enforceable by sale of mortgaged property even though the mortgager be an agriculturistand the mortgage property be lands or houses belonging to anagriculturist.

Where, therefore, with respect to a mortgage-debt, a decree in terms of S. 11, Jammu and Kashmir Agriculturists' Releif Act was drawn, but when on default of more than two instalments the decree - holder applied under 0. 34, R. 4 for a final decree for sale of mortgage property, objection was taken, that it being agricultural land, no decree for sale could be passed.

Held, that S. 60 (1) was no bar in putting the property to sale. AIR 1945 Lah 123 — 1924 All 328 (FP) and 4 J&K LR 150 Relied on. AIR 1941 Pesh 53 and AIR 1937 Lah 194, Not followed.
Anno. AIR Com. Civil P. C. 0. 34, R. 5 N. 5.

Cases Referred :-

AIR 1941 Pesh 53 : 194 Ind Cas 716
AIR 1937 Lah 194 : 173 Ind Cas 589
AIR 1945 Lah 123 : ILR (1945) Lah 373 (FB)
AIR 1924 All 328 : 46 All 489 (FB) 4 J&K LR 150.
Khem Chand V. Mela Ram & Ors. Civil Org. Suit Nc. 9 of 1993 D/- 24-3-1955. AIR 1955 J&K 33 (H. C.) S. B.

J & K Constitution Act 1996 — Ss. 4, 5 — Whether His Highness could entrust all his powers, rights and authority under sections 4 and 5 to any person whom he liked.

His Highness the Maharaja of Jammu and Kashmir's legislative executive and judicial powers in relation to the State were not limited in the sphere outside the matters assigned to the Union. He could entrust all his rights and authority under Ss. 4 and 5 of the Jammu and Kashmir Constitution Act 1996 to any person whom he liked even to the extent of effacing himself altogether as the British Parliament can do and his proclamation dated 7th Har 2006 published in Extraordinary Gazette date 20- 6- 1949 entrusting these powers to Yuvraj was perfectly valid and constitutional.
Maghar Singh & Ors V. Principal Secretary J&K Govt. 1st Appeals No. 29 of 2008 and No. 4 of 2009 D/- 25-3-1953. AIR 1953 J&K 26 (H. C.) D. B.

(Jammu & Kashmir Constitution Act (14 of 1996) Ss. 5, 38— Ordinance passed under — Distinction — J&K Ordinance No. 8 of 2005 passed under S. 5 does not expire after six months — (Jammu & Kashmir) Enemy Agents Ordinance '8 of 2005) S. 1)

A time limit of six months is prescribed for an Ordinance that may be passed by His Highness under S. 38 of the (J & K)

Constitution Act, 1996 on the recommendation of the Council, but as regards the laws and ordinances that are passed by His Highness by virture of the powers reserved in him under S. 5 of the Constitution Act no time limit has been prescribed in the Act. The result is that any such ordinance passed under S. 5 by His Highness would continue to exist as long as it is on the Statute Book and has not been repealed by the authority promulgating the same.

Held that the Enemy Agents Ordinance, (8 of 2005) having been passed under S. 5 of the Constitution Act was still in force and would continue to be in force till it was repealed.

Gh. Nabi & Ors V. State, Cr. Revn. No. 28 of 2006 D/- 9 Maghar 2006. AIR 1953 J&K 3 (H. C.) S. B.

Jammu & Kashmir Constitution Act (1996), S. 6 — Jammu & Kashmir Preventive Detention Act (2011). S. 3 — Order of detention issued not on behalf of Sadar-i-Riyasat — Validity of order-

The words "superintendence. direction and control" as used in S. 6, Jammu and Kashmir Constitution Act, 1996 involve the exercise of control and the giving of directions. Therefore, the detention orders are not bad, because they have been issued on behalf of the Government and not in the name or on behalf of the Sadar-i-Riyasat.

M. Subhan & Ors V. State, Cr. Mise. Applns. Oos. 38 to 40, 42, 44 to 48 and 51 of 1955 D/- 2-8-1955. AIR 1956 J&K 1 (H. C.) F.B.

Jammu and Kashmir Constitution Act (1996) (as amended in 2008 and 2009), S. 6 and S. 4 (2) — Powers of superintendence, etc-, of Government.

Per Shahmiri, J.: The powers of superintendence, direction and control of the Civil Administration and the Government vested in the Council are exercisable by them in so far as these may be construed to fall within the words "except in so far as may be otherwise provided by or under this Act" as used in S. 4 (2) of the Act.

M. Sultan & Ors V. State, Cr. Misc. Applns Nos. 38 to 40, 42, 44 to 48 and 51 of 1955 D/- 2-8-1955. AIR 1955 J&K 1 (H. C.) F. B.

Jammu & Kashmir Constitution Act 1996 — Sections 6 and 7 Sanction for the prosecution of ministers — Sanction of His Highness not necessary under the existing law.

Held that there is not even a remotest suggestion in sections 6 and 7 of the Constitution Act, 1996, which, might lead one to the conclusion that sanction is necessary fot the prosecution of ministers. The word "responsible" used in section 7 means that the appointment and removal of ministers vests in His Highness, and that in administrative matters relegated to their charge they are answerable only to His Highness and that the legislature cannot, on an adverse vote passed by it, bring about the removal of a minister. The two sections referred to above being silent as regards sanction we have naturally got to refer to the provisions of the Criminal Procedure Code. The only section which deals with sanction for the prosecution of public servant is Section 197 Cr. P. C. According to this section any public servant who is not removable from his office save by or with the sanction of the Government and is accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge

of his official duties cannot be prosecuted except with the previous sanction of the Government. Apart from the fact as to whether the allegation against the accused is that he has acted in the discharge of his official duties or not but the mere fact that the accused was not a public servant removable by the Government this section does not and cannot apply.
AIR 1948 PC 128 referred to.
R. B. Ramchandra Kak V. State, Criminal Revision No. 19 of 2005
7 J&K LR 261

Jammu and Kashmir Constitution Act (14 of 2 1996). S. 64 — High Court's power of superintendence over Court of Rent Controller — (Houses and Rents — Jammu and Kashmir Houses and Shops Rent Control Act (SM, 2009), S. 21) — (Letters Patent (Jammu and Kashmir) S. 22) — (Constitution of India (1950), Art. 227).

Under S. 64 of the J&K Constitution Act read with S. 22 of the Letters Patent, the High Court has power of superintendence over Courts over which it has revisional or appellate jurisdiction. As S. 21 of the Houses and Shops Rent Control Act, 2009, Sub-s. (5) empowers the High Court to hear revisions from an order of the District Judge passed in appeal against the order of the Controller it can exercise superintendence over the Court of the Controller as well,

The power of superintendence should be exercised very sparingly and only in those cases where a party is likely to suffer irreparable damage in case an order of the Court is allowed to stand. When there is another remedy open to a party the power of superintendence of the High Court cannot ordinarily be invoked and therefore when a final order passed by the Rent Controller in a case will be appealable and the aggrieved party would then have a right to get any error rectified the High Court will not interfere with an interlocutory order passed by this authority.
Bodhraj V. Gurcharandas. Civil Revn. No. 103 of 2010 D-10-2-54.
AIR 1955 J&K 29 (H. C.) D. B,

J&K Defence Rules (1996) — R. 24 — Order under — Whether can be interfered with — established principles of interference by the High Court stated — Magistrates invested with powers as persona designata under the Defence Rules — if proved to have acted as a magistrate under the Cr. P. C. High Court has jurisdiction to interfere —

Here the learned S. D. M. has initiated the proceedings by recording the statements of the tenants as witnesses. He has described them as 'Shakayat Kunanda" which when translated to English would mean nothing but a complainant. These statements have been taken on solemn affirmation, now it is universally known principle of law that an oath can be administered only by a Court (Circular No. XXXIV) authority to administer oaths is vested only in Courts and in persons having by consent of parties authority to receive evidence (i. e. arbitrators). According to rule 4 of the said rules oaths or affirmations shall be made only by witnesses examined before a Court and (b) interpreters and jurers. A witness refusing to take an oath is liable to punishment under Rule II. An oath having been administered out by the SDM to the deponents, it must be presumed that this Act of administering oath has been regularly performed. Obviously the SDM could not administer an

oath if he acted as an agent of the Government. If an oath has been administered by him, it could be done only if he were acting as a Court. The illustration (e) of S. 114 of the Evidence Act lays down that "the presumption is that judicial and official acts have been regularly performed." This presumption can be made applicable to the facts of the present case only when it is presumed that the SDM was acting as a Court, when it administered out an oath to a deponent. True that the S D M says that he administered oath to the illiterate deponents only to make them alive to the spiritual consequences which might follow from their speaking an untruth. But whatever be his reasons, he could not hold out, an oath unless he was taking judicial proceedings as defined in S. 4 (i) (n), Criminal P. C. Judicial Proceedings include any proceedings in the courts of which evidence is or may be legally taken on oath. In this case evidence has been taken either legally or illegally.

The procedure adopted by the S. D. M. would conclusively show that he was taking nothing but judicial proceedings. All the precautions that are necessary to be taken while examining a witness by a Court, have been taken by the S. D. M. and the statements have been read out to the witnesses making them and have been accepted correct by them. In the order of detention passed against the petitioner by the SDM we fined him using the seal of the Court and in the body of the order he says that this order was given under his hand and seal of the Court. The matter does not stop here. In the order dated 5th Poh 2005 by which a bond was taken as a guarantee for his good behaviour from the petitioner, the S. D. M. has described himself as a Court. Thus it is evident that the S. D. M. has been describing himself as a Court from the very beginning and has been acting as a Court from the very beginning.

If acting as a Court, the S. D. M. has taken some proceedings and passed some orders, we are of the opinion that such proceedings can be revised by the High Court.
Waryam Singh V. State, Cr. Misc. NO. 97 of 2005. 8 J&K LR 14 (H. C.) D, B.

Jammu and Kashmir Defence Rules, Rs. 68 (4) and 118 — Attempt to export ghee outside Jammu and Kashmir, when it was prohibited —

Accused caught inside State far away from border, while carrying ghee tins in truck — Held though there might be intention and preparation, there was no attempt — Accused held entitled to benefit of doubt — (Penal Code (1360), S. 511), AIR 1932 Mad 507, Relief AIR 1952 J&K 55 Applied.
Anno. Penal Code, S. 511 N. 1.
Parsi Dass & Anr V. State, Cr. Revn. No. 62 of 2009 D/- 19-12-52. AIR 1953 J&K 19 (H. C.) S. B.

J&K Egress and Internal Movement (Control) Ordinance (2005), S. 3 — Attempt to commit offence — What is — Accused going towards border with intention to cross over to Pakistan — Arrest at 160 yards from border — Held, offence was not completed — (Penal Code (1860), S. 511)

Before the commission of an offence, an accused has got to go through three preliminary stages; first that of intention to commit the offence,secondly. preparation to commit and offence is not

punishable. Nor is preparation to commit it. It is only when the preparationmerges itself in attempt that the act becomes punishable by law.

Where a woman was going towards the border with the intention to criss over to Pakistan but was arrested when she had 160 yards more to cover and tried for an offence underS. 3 of the Ordinance.

HELD that (1) the Section was designed to deal with the action of those persons who make an attempt to cross the border without permissioa. There could be no presunption that anybody who moved towards the border wanted to cross-over. The offence would commence only when a step was taken towards crossing the border.

(2) that her action amounted to a mere preparation and not an attempt and as before actually reaching the border line she might have changed her mind and come back, benefit of doubt should be given to her. 8 Mad. 5 and AIR 1932 Mad. 507, Rel. on. Anno. I. P. C., s. 511 N. 2.

Mt Noor Bjbi V. State, Cr. Revn. No. 74 of 2007, D/- 10 Assuj 2007. AIR 1952 J&K 55 (H. C.) S. B.

J&K Enemy Agents Ordinance (No. 8 of 2005) — Continuity of — whether expired after six months or continues in force and will continue in force until repealed by the same authority that promulgated it

A time limit of six months is prescribed for an Ordinance that may be passed by His Highness under S. 38 of tbe (J&K) Constitution Act, 1996, on the recommendation of the Council, but as regards the laws and ordinances that are passed by His Highness by virtue of the powers reserved in him under S. 5 of the Constitution Act no time limit has been prescribed in the Act. The result is that any such ordinance passed under S. 5 by His Highness would continue to exist as long as it is on the Statute Book and has not been repealed by the authority promulgating the same.

Held that the Enemy Agents Ordinance, (8 of 2005) having been passed under S. 5 of the Constitution Act was still in force and would continue to be in force till it was repealed.

Gh. Nabi & Ors V. State, Cr. Revn. No. 28 of 2006 D/- 9 Maghar 2006. AIR 1953 J&K 3 (H. C.) S. B.

J&K Enemy Agents Ordinance (8 of 2005), S. 9 (3)—Order of Acquittal by Special Judge — Revision against, is competent.

The wording used in S. 9 (3) of the Ordinance is almost the same as used in S. 435, Criminal P. C., and though the word 'revision' is used in neither of them, a revision application is competent against an order of acquittal passed by the Special Judge, in as much as sub-s. 3 of S. 9 empowers the reviewing judge to call for and examine the record of any proceeding before the Judge for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed.

V. State. Dr. Ab. Majid & Ors Cr. Revn. No. 36 of 2006 D/- 31 Jeth 2007. AIR 1952 J&K 41 (H, C.) S. B.

J&K Enemy Agent Ordinance (8 of 2005), S. 9 (3)—Revision against order of acquittal by Special Judge — Reviewing Judge, powers of — Only retrial can be ordered. (Cr. P. C. (1898), S. 439).

While hearing a revision application under S. 9 (3), a Re-

viewing Judge can, by virtue of S. 9 (2) of the Ordinance, exercise only those powers as are enumerated in S. 439, Criminal P. C. Under S. 439 (4) the High Court is not authorised to convert a finding of acquittal into one of conviction. The only order which the Reviewing Judge can, therefore, pass, when he makes his mind to accept the revision petition, is to order a retrial.
Anno. Cr. P. C. S. 439 N. 13.

State, V. Dr. Ab. Majid & Ors Cr. Revn, No, 36 of 2006 D/- 31 Jeth 2007. AIR 1952 J&K 41 (H. C.) S. B.

Jammu and Kashmir Essential Supplies (Temporary Powers) Ordinance (2003), S. 2 (b) — 'Export' meaning of — (Words and Phrases).

'Export' as defined in S. 2 (b) of the Ordinance has been used in a wider sense and it includes movement from one part of the State to another.

Tek Chand Nanda V. State of J&K, Writ Petition No. 64 of 1955 D/- 2-1-1956. AIR 1956 J&K 26 (H. C.) D. B.

Jammu and Kashmir Essential Supplies (Temporary Powers) Ordinance (2003), S. 3 — Notification under, dated 26-10-1955 Validity (Constitution of India, Arts. 13, 19, 305) — (Constitution Application to Jammu and Kashmir) Order, (1954), Para 4 (d)).

Both S. 3(1) of the Ordinance and the Notification issued by the Government under it are valid and restrictions imposed by them are reasonable within the meaning of Art. 19(6) of the Constitution.

Under the impugned Ordinance and the Notification no restrictions have been placed on the business of supplying milk to the Military in Baramulla or Srinagar. All that has been done is to prohibit the movement of milk from the province of Jammu to the province of Kashmir in order to maintain the supply of milk in Jammu Province at a fair price.What has been done sppears to be more a limitaion on the provisions relating to trade, commerce and intercourse contained in Part XIII of the Constitution than an infiingement of Art. 19(1)(g) and this linitation is permissible under Act. 305 of the Constitution

The word 'prohibiting' as used in S. 3(1) of the Ordinance is not repugnant to the Constitution, as the words 'reasonable restriction' as used in Cl.(6) of Art. 19 would include total stoppage, 1954 SC 465 (AIR V. 41) and 1951 All 257, Rel. on.

A reference to the provisions of the Ordinance would also show that a contravention of the Notification would be punishable under S. 7 of the Ordinance. The Notification is clearly covered by the term 'existing law' as used in Art. 19(6). It is also within the definition of law as contained in Art. 13(3)(b) of the Constitution. While under paragraph 4(d) of the Constitution (Application to Jammu and Kashmir) Order, 1954 for a period of five years from the commencement of the order the words 'reasonable restrictions occurring in Cls. 2, 3, 4 and 5 of Article 19 are to be construed as meaniag such restrictions as the appropriate Legislaturedeems reasonable, Clause (6) of Art. 19 is subject to no such limitation and, therefore, it is for the High Court to pronounce whether the restrictions imposed by the Ordinance and the Notification imposed issued under it are reasonable or not.

In the circumstances if this case the burden of showing that the Notification issued by the Government is unreasonable is on the

petitioner and the facts of this case did not show that the order contained in the notification is reasonable on the face of it. Case law Ref.
Anno. AIR Com., Const. of India, Art. 19 N. 20, 24, 77, 82; Art. 13 N. 2, 2b.
Cases Referred
AIR 1950 SC 163 : 1950 SCR 566 (SC)
1951 SC 118 : 1250 SCR 759 (SC)
1952 SC 115 : 1952 SCR 572 (SC)
1952 Mad 565 : ILR 1952 Mad 957
1954 SC 465 : 1954 CRI LJ 1322 (SC)
1951 All 257 : ILR 1951 All 269 (FB)
1951 SC 41 : 1950 SCR 869 (SC)
1952 Cal 502 : 55 Cal WN 686
1954 SC 224 : 1954 SCR 803 (SC
1954 SC 788 : 1955 SCR 707 (SC)
(1919) 249 US 152 : 63 LAW ED 527
T. C. Nanda V. State, Writ Petn. No. 64 of 1955 D/- 2-1-1956. AIR 1956 J&K 26 (H. C.) D. B.

Jammu and Kashmir Essential Supplies (Temporary Powers) Ordinance (2003), S. 3 (1) — Not hit by Part XIII of the Constitution as being existing law — (Constitution Application to Jammu and Kashmir Order (1954), Para 16 (b) (iii)).

Sub-s. (1) of S. 3 of the Ordinance is not hit by any provision contained in Part XIII of the Constitution. The Ordinance was passed in 2003 by the then Ruler under S. 5 of the Jammu and Kashmir Constitution Act, 1996, as it was then in force and falls within the phrase "existing law" as used in Art. 305 (vide Art. 366 (1) and Art. 372 read with para 16 (b) (ii) of the Constitution (Application to Jammu and Kashmir) Order, 1954).
T. C. Nanda V. State of J&K. Writ Pet. No, 64 of 1955 D/- 2-1-1956. AIR 1956 J&K 26 (H. C.) D. B.

J&K Food Offence (Enhanced Penalties) Ordinance (3 of 2006) — S. 11 Order by Special Magistrate — Appeal to Sessions Judge — Revision to High Court against order in appeal not barred.

It is only an order or sentence of a Special Magistrate which cannot be revised under S. 11 of the Ordinance, but when once an order is passed by the Special Judge in appeal against the order of a Special Magistrate, a revision application against such an order is not barred by S. 11 : AIR 1943 All. 26 Disting.
Qadir Chandu V. State, Cr. Revn. No. 87 of 2006 D/- 13 Har 2007 AIR 1952 J&K 46 (H. C.) S. B.

J&K Gambling Act (18 of 1977), Ss. 5 and 6 — Applicability of Criminal P. C. to search — (Criminal P. C. (1898) Ss. 165 and 103) — Public Gambling Act (1867), Ss. 5, 6).

Section 5 of the Act which authorises the District Superintendent of Police to search does not provide as to how search has to be conducted. Hence by Section 5 (2), Criminal P. C. the provisions of the Criminal Procedure Code relating to search will apply and the District Superintendent of police has to conduct the search in accordance with S. 165 and under the general provisions of S. 103 of that Code. The words 'shall be prepared' in Cl. (2) of S. 103 would mean that the officer conducting the search should under his personal supervision, control and direction prepare the

inventory of the articles seized during the search. When it has been so made the search cannot be held to be not one according to law in as much as the list was not in the hand - writing of the District Superintendent of Police.

If on the other hand the search was not conducted under the direct supervision and control of the District Superintendent of Police and he signed the inventory only at a later stage, the presumption under S. 6 will not arise as the search was not conducted according to law.

Anno. Pub. Gamling Act, S. 5. N. 4; S. 6 N. 1; Criminal P. C. S. 165 N. 1, 12; S. 103 N. 16.

The State V. Sujan Singh & Ors' Acquittal Appeal No. 1 of 2010 D/- 9-9-53. AIR 1954 J&K 28 (H. C.) D. B.

Jammu and Kashmir High Court Rules and Orders, Vol. III, R. 16 — Valuation for appeal — Suit for pre-emption of house

In a suit for pre-emption of a house, forum of appeal is not determined by the value of property put in the plaint but by the price determined by the trial Court.

AIR 1925 Lah 41, 1936 Lah 133, Distinguished.

First Appeals Nos. 53 and 1 of 2007. Mohd Sadiq & Ors V. Jamal Soofi & Ors. AIR 1952 J&K 19 (H. C.) D. B.

Jammu and Kashmir Ordinance (VIII (8) of 2006) S. 11 — Power of High Courts under S. 561 - A Criminal P. C. not taken away

All that has been taken away from the High Court is the power of revision and nothing more, and the High Court has got powers to see if substantial justice is done in a case started under the provisions of the ordinance.

AIR 1946 P.C. 169 and AIR 1943 Pat 18 disting.

J. N. Kaul V. State, Cr. Misc. Appln. No. 14 of 2008 decided on 20 Bhadoon 2008, AIR 1952 J&K 2 (H. C.) D. B.

Jammu and Kashmir Restitution of Mortgaged Property Act, Ss. 2, 5 — "To all mortgages of immovable property."

The Act applies to those mortgages only in which possession has passed from the mortgagor to the mortgagee or in which sale of the mortgaged property is sought, by an order of the Court. If the mortgagee under a simple mortgage does not enforce his right of bringing the property to sale and seeks only a simple money decree, the provisions of the Act can with no stretch of imagination apply to such a case.

AIR 1922 Nag 98; 1932 Pat 360 and 1 All 240 (FB), Rel. on

Hari Singh & Anr. V. L. Dina Nath Mahajan. 2nd appeal No. 53 of 2009 D/- 1-6-1955. AIR 1954 J&K 14 (H. C,) D. B.

Jammu and Kashmir Right of Prior Purchase Act (1933). Ss.14 and 15 — Words "agricultural land" in Section 14 includes agricultural land in village and also in urban area—"Immovable Property" does not include agricultural land.

The words "agricultural land" occurring in Sec. 14 include agricultural land in an equally clear that the expression "immovable property" in this section does not include agricultural land. It follows that on the literal construction of the section the owners of

continguous properties have no right of pre-emption in respect of agricultural land wherever it may be situated. The words 'immovable property' in Ss. 14 and 15 were not intended by the framers of the Act to include agricultural land. Having provided by Section 14 that agrlcultural land, regareless of its situation, can be the subject of pre-emption by the four classes of persons therein mentioned it could not have intended that such land should be again provided for in S. 15 and the right of prior purchase given to quite a different set of persons.

Sultan Sofi & Ors V. Shaban Sofi & Ors. Appeal No. 1 of 1951 D/- 18-6-1951. AIR 1952 J&K 20 (Board of Judicial Advisers)

Jammu and Kashmir State Evacuees' (Administration of Property) Act (2006), S. 2 (a) — Allottee is not a licenses — (P. T. Act (1882), S. 105).

The position of an allottee under J. & K. State Evacuees (Administration of Property) Act (2006) is quite different to that of the lessee. An allottee is merely a licensee 1951 Punj 327 and 1954 Punj 165 Rel. on.

Anno; AIR Com. T. P. Act, S. 105, N. 14.

Gian Kaur & Ors V. P. R. O. & Anr, Writ Petns. Nos. 255, 289 and 304 of 2011 D/- 9-3-1956. AIR 1956 J&K 33 (H. C.) F. B.

Jammu and Kashmir State Evacuees' (Administration of Property) Act (2006). S. 10 (1), Proviso — Cancellation of allotment not by Custodian but by Provincial Rehabilitation Officer — Proviso to S. 10 (1) cannot be invoked.

The proviso is added to S. 10 (1) and therefore it will appy to the provisions of S. 10 (1) alone and would not be read as an independent provison of the Act. That being so the proviso to S.10(1) cannot be invoked where the allotment is cancelled not by the Custodian but by the Provincial Rehabilitation Officer as the word allotment occuring therein is to be read ejusdem generis with the previous context, i. e: cancellation of the allotment by the Custodian.

Gian Kaur & Ors V. PRO & Anr. Writ Petns. Nos. 255. 289 and 304 of 2011 D/- 9-3-1956. AIR 1956 J&K 33 (H. C.) F. B.

Judgment — appealable cases — should opine on all the important points.

Court should pronounce its opinlon on all important points involved in the case.

Anno. C. P. C; 0. 20, R. 4 N. 6.

Gangu & Ors V. Lassa Zargar & Ors. Rev. 1st appeal No. 23 of 2008 D/- 5-4-1954. AIR 1954 J&K 44 (H. C.) S, B.

Judgment — Consolidated judgment in cases which are separate — trials conducted separately — practice neither warranted by law nor by any consideration of convenience.

Held that the procedure adopted by the learned Sessions Judge in writing consolidated judgments in cases which are separate and wherein trials have also been conducted separately, is not at all proper. This practice is neither warranted by law nor by any considerations of convenience. Such type of judgments far from contributing to speedy dispostl of cases take a lot of time in trying together facts in the labyrinthine mess in which the appeals are

cast by adopting such a procedure. In case of every separate trial, separate judgment should be passed.
AIR 1920 All. 79 :
1928 Cal. 230 referred to.

Ahad Dar V. State, Criminal Revision No. 40 of 2006, 8 J&K LR 177 (H. C.) Single Bench.

Judgment — construction of by the author of his own judgment — value of — real or expressed intention — relevance of.

On a question of construction of the judgment the real intention of the Judge not expressed in the judgment may be irrelevant. It may also be irrelevent if the expressed intention is opposed to the real intention. But where the expressed intention corresponds to the real intention then in such a case, the interpretation put by the author on his own judgment cannot be wholly without value.
Anno. Civil P. C ; 0. 20 R. 4 N. 7

Raja Sahib of Poonch V. Kirpa Ram. Civil Appeal No. 3 of 1951 D/- 19-8-1952. AIR 1954 J&K 23 (Board of Judicinl Advisers).

Judgments — lower courts not adverting to certain facts indicative of the innocence of the accused and facility of the presecution case — whether judgments vitiated — desirability of independent and thorough examination by the Board.

There is yet another circumstance that points to the desirability of an independent and thorough examination of the evidence by the Board. It appears that certain facts, which were indicative of the innocence of the accused and facility of the prosecution case, were not referred to or touched by the Courts below and this, in the opinion of the Board, vitiated the conclusion arrived at by these Courts.

Badri Nath V. State, Cr. Appeal No, 1 of 1952 D/- 18-8-1952. AIR 1953 J&K 41 (Board of Judicial Advisers)

Judgment — What is.

A judgment of a civil Court must contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.

Satar & Ors V. Razak & Ors. Civil IInd Appeal No. 25 of 2005. 8 J&K LR 157 (H. C.) Single Bench.

Judicial act — what is —

Held that an order passed by a Magistrate under the Ordinance is a Judicial order and not an executive order. A judicial act is an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights of others A. I. R. 1946 Bombay 280 referred to, A. I. R. 1946 Bombay 533 distinguished.

Raj Alias Des Raj and Another Versus Mst Batnl Begum. Criminal Revision No. 56 of 2006. 9 J&K LR 69 (H. C.) D. B.

Judicial Oaths Rules of 1950 — (Circular No. XXXIV) — R. 3 — authority to administer oath.

Held According to Rule 3 authority to administer oath is vested only in Courts and persons having by consent of the parties authority to receive evidence (i.e. arbitrators) According to Rule 4 oath or affirmations shall be made only by witnesses examined before a Court.

Waryam Singh V. State, Cr. Misc. No. 97 of 2005. 8 J&K LR 14 (H. C.) D. B.

Judicial or executive proceeding.

S. D. M. took the proceedings a complaint that was made to him orally by certain tenants of the petitioner. The S. D. M. recorded their statements on oath, read these statements over to them and then got those statements signed by the deponents.

Held it was a judicial proceeding.

Waryam Singh V. State, Cr. Misc. No. 97 of 2005. 8 J&K LR 14 (H C.) D. B.

Judicial Proceedings — S. 4 (i) (n) Cr. P. C. —

Judicial proceedings include any proceedings in the course of which evidence is or may be legally taken on oath.

Waryam Singh V. State, Cr. Misc. No. 97 of 2005. 8 J&K LR 14 (H. C.) D. B.

Jurisdict of Civil and Revenue Courts — Interpretation of terms of a grant alleged to confer proprietary rights—Order of His Highness on the recommendation made — Value of entry of proprietary interest in Revenue records by Revenue anthorities — Sovereign jurisdiction of His Highness in all matters relating to State. It is, however, open to His Highness to separate his jurisdiction in several matters and to exercise it separately.

The responsibility of interpreting the terms of a grant ultimately rests upon the civil Court and it is not possible to regard His Highness in interpreting the terms of grant as exercising the jurisdiction of a Civil Court.

The responsibility of making a Crown grant rests upon the Government or upon His Highness in exercise of his gevrnmetal functions. And it is not within the province of Revenue and Settlement authorities to make Crown grants or to dispose of Crown rights and privileges in land.

The entry of proprietary interest in Revenue records is good enough for revenue purposes but it is not sufficient by its own force to create or extinguish proprietary rights in persons affected by the entry .And the order removal of a man's name from proprietary column of revenue records even when accompanied by a consenting statement does not divest him of his proprietary interest in the land unless it possible to found a valid grant upon the consenting statement.

No doubt His Highness is vested with a sovereign jurisdiction in all matters relating to the State but it is open to him to separate his jurisdiction in several matters and to exercise it separately. And it is a question of fact in each case what particular jurisdiction he is exercising.

Bhagtu & Others Versus Wazir Moti Ram & Other Piaroo & Others Versus Wazir Moti Ram And Others. Civil Appealsnos. 11 & 12 of 1950. 9 J&K L. R. 128 (Board).

Jurisdiction of the High Court for interference in a second appeal, with findings of fact. Interference when warranted

Held that the jurisdiction of the High Court for interference in a second appeal is limited by section 100 of the Civil Procedure Code. It can interfere with findings on questions of fact only

when the Courts below have committed some error of law or procedure and. however, perverse the findings of the Courts below may be they are binding upon the High Court unless they are vitiated by any error of misdirection in law. It is, therefore, not only proper and desirable but it is necessary that when the High Court interferes with a concurrent finding of the Courts below or with the finding of a lower appellate Court on a question of fact it should state in its judgment the error of law committed by the Courts below and the reasons for the interference.

Badri Nath V. Basantu & Ors, Civil Appeal No. 1947. 7 J&K LR 213 (Board of Judicial Advisers)

Jurisdiction —— Sovereign jurisdiction of His Highness.

In all matters relating to the State —— Open to His Highness to separate his jurisdiction in several matters and to exercise it separately.

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Bhagtu & Others V. Wazir Moti Ram & Others. Piaroo & Others V. Wazir Moti Ram & Others. Civil Appeals Nos. 11 & 12 of 1950. 9 J&K LR 128 (Board)

Kashmir Ailan No. 23 promulgated in 1985 — "Lawalad" —— Meaning of.

In R. 63 of the standing Order No. 23 of the Revenue Department which is in English and reproduces the Ailan the equivalent of "Lawalad" is not used. It uses the expression 'without heirs' and is undoubtedly more in accord with the intention underlying the Ailan. The word "Lawalad" has been used loosely in the Ailan, and the intention was that where under the law of inheritance a case of escheat arises His Highness will forego the right thus accruing to him in favour of the entire body of cosharers. It was an act of grace to commemorate the happy occasion of his Cororation and it could not have been the intention of His Highness to deprive any one who but for the Ailan, would have been entitled to inherit. Hence the plaintiffs are bound to prove that a Hindu died not only without leaving no issue but futher that he left no heir under the Hindu Law so that a case of escheat arose ; 12 Moo. Ind. App. 448 (P C.), Rel. on.

Rassia and V. Lachmi Dass & Ors. Appeal No. 1 of 1948 decided by the Board of Judicial Advisers. AIR 1951 J&K 23 (Board of Judicial Advisers)

Kashmir Civil Service Regulations (General) — Whether have a statutory force — nature of rules — For guidance and can be changed.

The Kashmir Civil Service Regulations (General) prima facie were framed by His Highnesses' Govt. There is nothing to show that they were made under the provisions of any statute or that they ever received the sanction of His Highness on the basis of a legislative enactment. It is not therefore possible to give these rules a statutory force. No doubt these rules have framed by the Government with some sort of approval by His Highness and they

are for the guidance of the Government and are binding upon it and cannot be disregarded, but it is one thing to say that the rules are binding on the Government and cannot be disregarded and it is quite another matter to say that these rules operate as a condition precedent to the exercise of the power of the Government or of His Highness to dismiss a servant at pleasure. Such rules whether framed under a statute or independently of it, genenerally provide for many details and can be changed at the wish of the Government and they have never been treated on the same footing as the provisions of a statute in restricting the power of the Crown to dismiss at pleasure.

These rules contain solemn pledges and assurances given to the services in regard to security and efficiency of the service and they are to be followed in letter and spirit. Any serious violation of the rules renders the dismissal wrongful which it is the responsibility of the Government to set right when the matter is brought to their notice by the aggrieved servant. But since these rules do not limit in any way the powers of the dismissal of the Government, it is not open to the Court to treat such wrongful dismisal as void and as of no legal effect and to declare that the dismissed servant continues in service.

Shenton V. Smith 1895 A. C. 229 = 69 LJ. P. C. 119, Venkata Rao V. Secy. of State AIR 1937 P. C. 31 Rel.

Anchai Singh Appellant V, Government, Appeal No. 15 of 1949, D/-17-6-1950. AIR 1951 J&K I (Board of Judicial Abviser)

Kashmir Civil Servicc Rules (General) — Kashmir Regulation I (1) of 1991 — Whether after the coming into force of regulation I of 1991 the appointments in the civil service, already mads by the Government and under it the employment of the civil servants before the said regulation being at the pleasure of His Highness whether after the regulations the service rendered at the pleasure of the Government constituted under the said regulation. Whether the power of dismissal at the pleasure of His Highness delegated to the Government and whether it makes any difference Regarding the legality of the dismissal from service and whether it could only be redressed by the Government or by His Highness and whether the dismissed employee had any remedy in court — Pleasure of His Highness whether absolute or restricted by the provisions of public servant's (Inquires) Act 1977 and by Rule 32 of the Kashmir Civil Service Rules (General) — Whether the latter have a statutory force ——

Appellant dismissed from service by an order of the Council on three sets of charges, when he was a member of the Civil Services of Kashmir holding the post of Game Warden, though appellant's service began as a Lieutenant in the Army from where it was transferred to the Civil Administration — The order of dismissal was preceded by an enquiry under the Kashmir Civil Service Rules (General) — followed by an appeal to His Highness which was dismissed — Thereafter various other proceedings by way of review and applications for reconsideration and mercy — Five years after the order of dismissal civil suit instituted for a declaration that dismissal was illegal, void and ineffectual and that he was still in the service of the State and therefore entitled to his pay and consequential damages for the wrongful dismissal — Suit dismissed

followed by appeal to the Board of Judicial Advisers, the order of dismissal challenged on the ground that it was not preceded by an inquiry under the Public Servants (Inquiries) Act 1977 and that the inquiry was made under the Kashmir Civil Service Rules (General) which was a farce as it did not afford sufficient or proper opportunity to clear himself of the charges of which he was found guilty and Kashmir Civil Service Rules (General) had the force of law and an order of dimissal in contravention of the Act and the Rules was void and ineffective. Even if his service was at the pleasure of His Highness unrestricted by any statute, it was not at the pleasure of His Highnesse's Government which could only dismiss him after following the Rules, and his wrongful dismissal by the Government though affirmed in appeal by His Highness did not tantamount to a dismissal by His Highness in the exercise of his pleasure. The High Court on the original side found that the appellant had not been given adequate opportunity of being personally heard in his defence and in the action that was ultimately taken against him there were included counts of which he was never charged and was contrary to the spirit and letter of Rule 32 of Kashmir Civil Service Rules (General) and therefore the dismissal from service was wrongful and illegal. These findings were affirmed in appeal by the High Court on the Appellate side. The Board of Judicial Advisers held these findings to be correct though challenged before it — The Board confined itself to the question as to what relief, if any the appellant was entitled on these facts.

(i) Held — that before the coming into force of Regulation I (1) of 1991, the Civivil employment was at the pleasure of His Hignness. After the Regulation came into force all future appointment in the civil service of the State should be deemed to be appointments made by the Government and under it. And all members of the State already employed on the date when Regulation came into force should also be deemed to be holding their appointments under the Government, whatever may be the origin of the service of the appellant by virtue of the Regulation I (1) of 1991 it also came to be under the Government by operation of the Regulation.

(ii) Held — Before Regulation I (1) of 1991 came into force the appellant's service was at the pleasure of His Highness not by reason of any prerogative of His Highness but because the nature of the appellant's service was such that public policy required that it must be at the pleasure of the employer and in the case of the appellant, of His Highness and this was by reason of the implied terms of his service and not by reason of any prerogative of His Highness. Shenton Vs Smith (1895) A. C. 229 : 64. L. J. P. C. 119) Rel.

It follows that when the appellant's service came under the Government after the Regulation, it had to be at the pleasure of the Government, by reason of the self same nature of the appellants' service

(iii) Held — Distinction no doubt exists in the laws of the State in regard to the powers of His Highness and the powers of His Highnesses' Government no question of delegation express or otherwise of His Highnesses' power of dimissal to the Council arises since the power of dismissal does not rest upon any prerogative of His Highness which has got to be delegated but it rests upon the nature of the service which will remain the same whether it is held under His Highness or under the Government. The Board

dissents from the view that the service of the appellant at the time of his dismissal was not at the pleasure of the Government. The service of the appellant being at the pleasure of His Highnesses' Government still the question remains whether his dismissal was void or legally ineffective and he still continues in service or it was only a wrongful dismissal which could only be redressed by the Government or by His Highness and for which the appellant has got no remedy in Court.

(iv) Held—It is now settled law that even when the service is at the pleasure of the Crown, either by express terms of the statute or by reason of the implied terms of the service, in either case the exercise of the pleasure of the Crown may be restricted by express terms of the Statute. And any dismissal from service in contravention of the express terms of the Statute applicable to a case will be void and legally ineffective and notwithstanding the dismissal the servant would still continue in service and may obtain a declaration from Court to that effect. Gould Vs Stuart (1896) A. C. 575 = 65, L. J. P .C. 82 Rangachari V, Secy of State. AIR 1937 P.C. 27, The High Commissioner of India V. 1.M Lall AIR 1948 P. C. 121 = 75. I. A. 225. Rel.

(v) Held The Public Servants (Inquiries) Act 1977 is an optional measure which gives the Government power in certain circumstances to institute a public inquiry under that Act in regard to alleged misbehaviour of a public servant. But it is not bound to take any action under that Act, if it does not wish or consider it proper to do so. This is made plain by the wording of S. 2 of the Act and it is not possible to treat the provisions of this Act as constituting any restrictions upon the power of dismissal which His Highness or which His Govt. may possess independently of the Act.

(vi) Held—*The Kashmir Civil Service Rules (General)* prima facie were framed by His Highness Govt. There is nothing to show that they were made under the provisions of any statute or that they ever received the sanction of His Highness on the basis of a legislative enactment. It is not therefore possible to give these Rules a statutory force. No doubt these rules have been framed by the Government with some sort of approval by His Highness and they are for the guidance of the Government and are binding on it and cannot be disregarded but it is one thing to say that rules are binding on tne Government and cannot be disregarded and it is quite another matter to say that these rules operate as a condition precedent to the exercise of the power of the Government or of His Highness to dismiss a servant at pleasure. Such rules whether framed under a statute or independently of it, generally provide for many details and can be changed at the wish of the Government and they have never been treated on the same footing as the provisions of a statute in restricting the power of the Crown to dismiss at pleasure. These rules contain solemn pledges and assurances given to the services in regard to security and efficiency of the service and they are to be followed in letter and spirit. Any serious violation of the rules renders the dismissal wrongful which it is the responsibility of the Government to set right when the matter is brought to their notice by the aggrieved servant. But since these rules do not limit in any way the powers of the dismissal of the Government, it is not open to the Court to treat such wrongful dismissal as void and as of no legal effect and to declare that the dismissed servant

followed by appeal to the Board of Judicial Advisers, the order of dismissal challenged on the ground that it was not preceded by an inquiry under the Public Servants (Inquiries) Act 1977 and that the inquiry was made under the Kashmir Civil Service Rules (General) which was a farce as it did not afford sufficient or proper opportunity to clear himself of the charges of which he was found guilty and Kashmir Civil Service Rules (General) had the force of law and an order of dimissal in contravention of the Act and the Rules was void and ineffective. Even if his service was at the pleasure of His Highness unrestricted by any statute, it was not at the pleasure of His Highnesse's Government which could only dismiss him after following the Rules, and his wrongful dismissal by the Government though affirmed in appeal by His Highness did not tantamount to a dismissal by His Highness in the exercise of his pleasure. The High Court on the original side found that the appellant had not been given adequate opportunity of being personally heard in his defence and in the action that was ultimately taken against him there were included counts of which he was never charged and was contrary to the spirit and letter of Rule 32 of Kashmir Civil Service Rules (General) and therefore the dismissal from service was wrongful and illegal. These findings were affirmed in appeal by the High Court on the Appellate side. The Board of Judicial Advisers held these findings to be correct though challenged before it — The Board confined itself to the question as to what relief, if any the appellant was entitled on these facts.

(i) Held — that before the coming into force of Regulation I (1) of 1991, the Civivil employment was at the pleasure of His Highness. After the Regulation came into force all future appointment in the civil service of the State should be deemed to be appointments made by the Government and under it. And all members of the State already employed on the date when Regulation came into force should also be deemed to be holding their appointments under the Government, whatever may be the origin of the service of the appellant by virtue of the Regulation I (1) of 1991 it also came to be under the Government by operation of the Regulation.

(ii) Held — Before Regulation I (1) of 1991 came into force the appellant's service was at the pleasure of His Highness not by reason of any prerogative of His Highness but because the nature of the appellant's service was such that public policy required that it must be at the pleasure of the employer and in the case of the appellant, of His Highness and this was by reason of the implied terms of his service and not by reason of any prerogative of His Highness. Shenton Vs Smith (1895) A. C. 229 : 64. L. J. P. C. 119) Rel.

It follows that when the appellant's service came under the Government after the Regulation. it had to be at the pleasure of the Government, by reason of the self same nature of the appellants' service

(iii) Held — Distinction no doubt exists in the laws of the State in regard to the powers of His Highness and the powers of His Highnesses' Government no question of delegation express or otherwise of His Highnesses' power of dimissal to the Council arises since the power of dismissal does not rest upon any prerogative of His Highness which has got to be delegated but it rests upon the nature of the service which will remain the same whether it is held under His Highness or under the Government. The Board

dissents from the view that the service of the appellant at the time of his dismissal was not at the pleasure of the Government. The service of the appellant being at the pleasure of His Highnesses' Government still the question remains whether his dismissal was void or legally ineffective and he still continues in service or it was only a wrongful dismissal which could only be redressed by the Government or by His Highness and for which the appellant has got no remedy in Court.

(iv) Held—It is now settled law that even when the service is at the pleasure of the Crown, either by express terms of the statute or by reason of the implied terms of the service, in either case the exercise of the pleasure of the Crown may be restricted by express terms of the Statute. And any dismissal from service in contravention of the express terms of the Statute applicable to a case will be void and legally ineffective and notwithstanding the dismissal the servant would still continue in service and may obtain a declaration from Court to that effect. Gould Vs Stuart (1896) A. C. 575 = 65, L. J. P .C. 82 Rangachari V, Secy of State. AIR 1937 P.C. 27, The High Commissioner of India V. 1.M Lall AIR 1948 P. C. 121 = 75. I. A. 225. Rel.

(v) Held The Public Servants (Inquiries) Act 1977 is an optional measure which gives the Government power in certain circumstances to institute a public inquiry under that Act in regard to alleged misbehaviour of a public servant. But it is not bound to take any action under that Act. if it does not wish or consider it proper to do so. This is made plain by the wording of S. 2 of the Act and it is not possible to treat the provisions of this Act as constituting any restrictions upon the power of dismissal which His Highness or which His Govt. may possess independently of the Act.

(vi) Held—*The Kashmir Civil Service Rules (General)* prima facie were framed by His Highness Govt. There is nothing to show that they were made under the provisions of any statute or that they ever received the sanction of His Highness on the basis of a legislative enactment. It is not therefore possible to give these Rules a statutory force. No doubt these rules have been framed by the Government with some sort of approval by His Highness and they are for the guidance of the Government and are binding on it and cannot be disregarded but it is one thing to say that rules are binding on tne Government and cannot be disregarded and it is quite another matter to say that these rules operate as a condition precedent to the exercise of the power of the Government or of His Highness to dismiss a servant at pleasure. Such rules whether framed under a statute or ind pendently of it, generally provide for many details and can be changed at the wish of the Government and they have never been treated on the same footing as the provisions of a statute in restricting the power of the Crown to dismiss at pleasure. These rules contain solemn pledges and assurances given to the services in regard to security and efficiency of the service and they are to be followed in letter and spirit. Any serious violation of the rules renders the dismissal wrongful which it is the responsibility of the Government to set right when the matter is brought to their notice by the aggrieved servant. But since these rules do not limit in any way the powers of the dismissal of the Government, it is not open to the Court to treat such wrongful dismissal as void and as of no legal effect and to declare that the dismissed servant

continues in service — —

Shenton V. Smith, 1895 A. C. 229 = 69 L. J. P. C. 119, Venkata Rao vs. Secy of State AIR 1937 P. C. 310 Reld.

(vii) Held — The question as to whether the dismissal of the appellant was made by His Highness personally or by His Government is not of any moment if the service of the appellant was in fact at the pleasure of His Highness or His Govt. It is immaterial who terminated the service or how it was terminated because if the service is at pleasure no matter how it is terminated. The appellant cannot get a declaration that he still continues in service against the wishes of His Highness or His Government.

(viii) Held — The order of the dismissal of the appeal by His Highness in a case of wrongful dismissal by the Council of a servant can be taken in fact and in law as an exercise of the pleasure of His Highness. The principles in Ranaga Chari V. Secy. of State AIR 1937 P. C. 27 — Suraj Narain Anand V. N. W. F. P. AIR 1942 F. C. 3 — held not applicable to His Highness who is the repository of all judicial, executive and legislative authority and who can lay down such procedure as he likes for the expression of his pleasure. In deciding appeal against the orders of his Council in cases of wrongful dismissal His Highness exercises a plenary and complete jurisdiction in exercise of all his powers and his order in these circumstances must be taken to be in the exercise of all his powers — —

Held — The claim for arrears of pay or for compensation or damages for wrongful dismissal is equally untenable — — — High Commissioner of India v. I M. Lal AIR 1948 P. C. 121 = 75. I. A: 225 and Halsbury Laws of England (Halisham Edn) Vols. VI and IX at p. 608, para 782 and P. 692 para 1177 — — Reld.

Anchal Singh.....Appelant Vs Government — — Appeal No. 15 Of 1949 — D/- 17 6- 1950. AIR 1951 J&K I. (Board of Judicial Advisers).

Kashmir Civil Service Rules (General), 1939 — An officer dismissed under Rules may question the legality of dismissal in a Civil court — Remedies under Rules must be exhausted before approaching Civil Court — Order of His Highness passed in appeal, revision or otherwise cannot be challenged in a Civil Court.

An officer as contemplated in the Kashmir Civil Service Rules (General) is not liable to dismissal from service at the pleasure of the Government and if dismissed, he has a remedy by way of questioning the legality of dismissal in a civil suit. It may, however, be noted that before an officer has a cause of action in a Civil Court, he must exhaust the remedies as provided for under the Rules. If the pursuit of the remedies takes the officer ultimately to His Highness by way of appeal, revision or otherwise, an order passed by His Highness cannot be challenged in a Civil Court. It is not meant that the powers of His Highness are exhausted by such an order made in accordance with a procedure laid down in Rules. But the inherent powers of His Highness are indistinguishable and his order cannot be challenged in a Civil Court.

Major Anchal Singh Plaintiff V. His Highness' Government Defendant Original Case No. 7 of 2002, 6 J&K LR Page 21 (H. C.) F. B.

Ed. Note.....reversed in 1951 J & K I by Board of Judicial Advisers.

Kashmir Civil Secvice Rules (1939) — Whether law within the meaning of Article 13 Constitution of Indin.

The term 'law' means rule of conduct enforceable in a Court of law. In order that a rule should be designated as law it must be established that it has the force of law.

The amendment to S. 4 (1) (b) of Sri Pratap J. and K. Consolidation Act places the Kashmir Civil Service Rules (1938) on the same footing as existing law enforceable by the State Courts. Hence the Kashmir Civil Service Rules (1939) are laws for the purposes of Art. 14 as applied to the State of Jammu and Kashmir AIR 1951 J&K 1 dissented from.

Anno. AIR Com. Const. of India, Art. 13 N. 2.

Gh. Rasul V. State, Misc. Appln. No. 23 of 1955, D/- 27- 9- 1955, AIR 1956 J&K 17 (H. C.) F. B.

Kashmir Civil Service Rules (General), 1939—Rules binding on Government—

Rules are binding on the officer as well as the Government. The Government may have the power to change the Rules, but it is obviously inequitable and unjust to hold that, whether changed or not, they bind only one party, namely the officer, and not the other party, namely the Government.

Major Anchal Singh Plaintiff V. His Highness Government Defendant Original Case No. 7. of 2002 5 J&K LR page 21 (H. C.) Full Bench.

Ed Note.....Reversed in 1951 J&K I by Board of Judicial Advisers.

Land Acquisition Act (X of 1990)—Section 18—State acquising land in exchange from a Jagirdar under Council Resolution — Formalities under section 4 and 7 not complied with — Whether referer ce under section 18 competent.

Held that proceedings as conceived on behalf of the State were not compulsory acquisition proceedings to attract the provisions of the Land Acquisition Act. What was contemplated was a free and open exchange by private prety between the State and the Jagirdar and the provisions of the Land Acquisition Act could not come into play.

Collector Kmr. V. Pt. Prem Nath Dar, Civil 1st Appeal No. 22 Of 2001, 7 J&K LR 89 (H. C.) D. B.

Land Alienation Act (V of 1995) — Section A — Suit for possession of land by the vender on the ground that the vendee was not a State subject or an agriculturist and that sale was void —— Vendee in possession of the requisite certificate from a Revenue Officer before the institution of the suit Certificate was cancelled on some grounds but subsequently restored on the strength of a Civil Court Decree to the effect — At the hearing of the suit the vendee in possession of the Certificate —— No plea taken by the vender that under section 4 and 5 of the Land Alienation Act, the sale deed obtained by the vendee cannot be upheld unless he was a State subject and an agriculturist when he purchased the property in suit — Suit dismissed.

Held that the suit was misconceived and was rightly dismissed.

D. Anand Kumar Madan V. Bhai Anant Singh Civil Appeal No. 4 Of 1948—8 J&K LR 47 (Board of Judicial Advisers)

Land Alienation Act (V of 1995)—Sections 4 and 5—Declara—tory decree passed by a Civil Court to the effect that the defendant was a State subject and an agriculturist———Plaintiff being not a party to the decree—Decree obtained against the State operates as res—judicata.

Held that sections 4 and 5 of the State Lands Alienation Act, were enacted by the State for the protection of a class of its subjects; the underlying policy being to prevent the passing of agricultural lands to persons who are not State subjects or are outside the agricultural community. Normally it is the State who would contest the claim of a person to have that status. In any suit, therefore, which may be brought by or against the State in which the status of a person claiming to be a State Subject and an agriculturist is in issue the State represents the entire community for whose benefiit sections 4 and 5 had been enacted. In such a case the State represents all interests which would be effected by the result of the suit. In the absence of fraud or collusion the decree passed in such a suit will be binding not only upon the State but all those persons who were represented by the State. Though the judgment is not a judgment in rem so as to be binding on the whole world it will nevetheless bind a limnited class of the public, namely, those who had an interest in the determination of the question whether the person concerned is a State subject and an agriculturist.

Dewan Anand Kumar Madan Versus Bhai Anant Singh Civil Appeal No. 5 Of 1948 8 J&K LR 47 (Board of Judicial Advisers)

Land Alienation Act (V of 1996)—Section 26 subsection (2)—An agriculturist alienated land to nonagriculturist—The vendee filed suit for declaration of title by adverse possession and obtained collusively consent decree—Wazir Wazarat applied to District Judge for revision of the decree being contrary to the provisions of the Act—District Judge rejected application holding that revision from consent decree lies to High Court and not to District Judge.

Held that the expression "such decrees" in section 26 (2) means the particular decree which is in question and if an appeal would not lie from the particular decree by reason of the fact that it was consent decree and therefore not appealable under C. P. C. then it is a case in which the application for revision would lie not to the District Judge but to the High Court.
AIR 1937 Lah. 33 followed.

Chief Revenue Officer Poonch, V/S Illahi Bux & Anr. Civil Revisions Nos. 45, 46 & 47 of 2004, 7 J&K LR 118 (H. C.) D. B.

Landlord and Tenant (Jammu & Kashmir)—Ejectment of tenant on ground that plaintiff requires land bona fide for personal cultivation — Facts to be proved.

In a suit for ejectment of a tenant on the ground that the plaintiff requires the land bona fide for personal cultivation, it is necessary for the trial Court to find out whether the plaintiff is in cultivating possession of any land and if so, to what extent. If it is found that the plaintiff has already 17 kanals of Abi or 33 Kanals of Khushki, then he is out of Court and cannot seek ejectment of the tenant on the ground that he needs the land for cultivating it personally but in case it is found that the plaintiff is not in possession of any land then enquiry has to be made

whether he bona fide requires the land for cultivating it personally. It will further be necessary to give a clear finding in regard to compensation claimed by the defendant.

There mere fact that a person is advanced in age and has retired from service should not be considered to be a disqualification for cultivating the land personally. A person may not be able to attend to all the details of cultivation personally. What is required is that he should engage himself personally in the cultivation of land and for that purpose he may get the assistance of his other relations and friends and with their help discharge the various details of work connected with the cultivation of land.

The mere fact that the plaintiff is residing at some distance from the land would not be sufficient circumstance to hold that he is not prepared to till the land personally. He may shift to the land during the time when it is to be cultivated and then return to his house, which is a few miles away, when his presence is no more required on the land.

Samad Butt V. Sadiq Najar & Ors. Rev. 1st appeal No. 41 of 2010 D/- 11- 12- 53. AIR 1954 J&K 58 (H. C.) C. J.

Landlord and tenant — Relationship of

The partition is a trasfer of property within the meaning of Section 5 and Section 109 as it has been held to be a miscure of surrender and a convenance of right in a property.

The defendant had by virtue of a rent deed taken on lease a small house from the plaintiff. This house was the part of some joint property which was owned by favour persons including the plaintiff. These persons who were related to each other as brother or cousins effected a partition of their joint property and this house which was rented out to the defendant fell to the lot of other three persons.

Held that any rights of realizing rent or ejecting the defendant which were possessed by the plaintiff once had ceased to exist so far as he was concerned and those rights were now vested in his co-sharers to when the exclusive ownership had been transferred by partition. On the date of transfer (in this case partition) the relationship of land and tenant ceased to exist between the plaintiff and the defendant therefore the defendant was not debarred from plending that he was not bound by any relationship of landlord and tenant so far as he and the plaintiff were concerned. Chitaley's T. P. Act cited with approval.

Anno. T. P. Act, S. 5 N. 4; Evidence Act, Section 116 N. 9

Skattar Singh V. Rawela, 2nd Appeal No. 94 of 2007, D/- 26th Poh 2008, AIR 1952 J&K 18 (H. C.) S. B.

Land Revenue Act (XII of 1996) — Sections 133 and 139 — — Land belonging to Government — Plaintiffs having a right of pasture only—Land broken open for cultivation by the defendant under permission of the proprietor—Suit for declaration in a civil Court to the effect that the plaintiff had a perpetual right of using the said land as pasture land — Whether suit cognizable.

Held that the plaintiffs have claimed the relief of declaration and alleged proprietory rights in themselves (without the slightest justification) in order to take the case out of the terms and scope of section 133 of the Land Revenue Act, which apparently does not contemplate a declaratory relief being granted by the revenue

authorities. No party can claim a declaratory relief as of right and the civil Court. assuming it has jurisdiction will do well to refuse to grant it in a case such as this where the plaintiffs on their showing have rushed to the civil Court before actual interference with their alleged possession and without impleading the Government whose rights are substantially involved in the controversy between the parties. The Board are of opinion that in any view of the case the plaintiff's suit was misconceived and was rightly dismissed.

Faqir Singh V. Basawa Singh & Ors. Civil Appeal No. 5 Of 1947, 7 J&K LR 236 (Board of Judicial Advisers)

Land Revenue Act (XII of 1996) — Section 139 (2) (xvii) —— Claim for partition of estate — Question of title.

It is well settled that an order, in partition proceedings leaving open to the aggrieved party a right to seek his remedy in other Courts. made by a revenue officicer in his capacity as a revenue officer and not in his capacity as a Court, cannot bar a civil suit on a question of title, whether such a suit is brought immediately after passing of the order or before the partition proceedings had commenced or it is brought after the partition proceedings had advanced to a certain stage or even when they had been completed.

Jamadar Rajwali Khan & Ors. (Pltff. Applts) Versus Hayat Ali Khan & Ors. (Defdt. Respdts) Civil Appeal No. 14 Of 1945, 6 J&K LR page 166 (Board of Judictal Advisers)

Land Revenue Act (XII of 1996) - Section 139(2) (XV)—Property sold by Revenue Courts for arrears of land revenue — — Sale confirmed and possession delivered to the auction purchaser —— Irregularities and illegalities in the conduct of sale — Plea of fraud raised but not proved — Whether a suit for recovery of possession in the Civil Court barred.

Held that a suit in the Civil Court would lie only on the ground that the Revenue Courts had no jurisdiction at all to proceed with the matter and had assumed jurisdiction when it did not exist. Eut in the other event, namely, where they have acted wrongly in the exercise of jurisdiction which vested in them a separate suit in the Civil Courts would not lie.
I. L. 25 Cal. page 833 and 876, AIR 1935, Pat. 490. AIR 1938 Lah. 198. AIR 1943, All. 282. AIR 1936 Cal. 138 distinguished.

Rajkumar V. His Highness Govt, Civil IInd Appeal No. 343 Of 2002, 7 J&K LR 26 (H. C.). D. B.

Land Revenue Regulation 1980—S. 130—Revenue Circular Vol. I P. 215.

Revenue Circular Vol. I P. 215 declares assami right to be fully heritable though not transferable and subject to the ordinary rules of inheri tance according to Hindu Law. This is expressly provided in the Land Revenue Regulation of 1980 section 130.

Pt. Janki Nath Appl. V. Sati Mali & Ors Civil Appeal No. 24 Of 1947 6 J&K LR 138 (Board Of Judicial Advisers)

Legitimacy — Date of birth and not date of conception is the basis of legitimacy.

Held that section 112 of the Evidence Act adopts the date

of birth and not the date of conception as the basis of logtimacy and provides that birth during the continuance of a valid marriage is conclusive proof of legitimacy. But before such a conclusive presumption can be drawn it must be shown that there was o valid marriage subsisting between the parties at the time of the birth.

Atta Mohd V. Fida Mohammad Civil Ilnd Appeal No. 1 Of 2003 in Forma P-Auperis 7 J&K LR 99. (H. C.)D. B.

Law—what is—

The term law means rule of conduct enforceable in a Court of law. In order that a rule should be designated as law it must be established that it has the force of law.

Gh. Rasul V. State Misc. Appln. No. 23 of 1955 D/-27-9-1955 AIR 1956 J&K 17 (H. C.) F. B.

Lease and license compared.

In a lease there is a transfer of interest in property whereas in licence no estate in property passes and it can be revoked at any time.

Anno :AIR Com. T. P. Act. S. 105, N. 13.

Gian Kaur & ors V. Pro & anr Writ Petns, Nos. 255, 289 and 304 of 2011 D/-9-3-1956 AIR 1956 J&K 33 (H. C.)F. B.

Lease—on construction of the document with attendant circumstances -- whether falling within the definition of lease.

Held that the word Bainama taken with the other terms such as Nazrana and Haq Maurus leads to the conclusion that the deed has been inartistically drawn up and amounts to no more than a transfer by the proprietor of a right to enjoy ther property in dispute. The terms of the document clearly fall within the definition of lease.

Gauri Shankar V. S. Gobind Singh. Civil Appeal No. 3 Of 1947, 7 J&K LR 224 (Board of Judicial Advisers)

Letters Patent — S. 22 —— Read with S. 64 J&K Constitution Act 1996—High Court has power of superintendence over the Court of Rent Controller

Under S. 46 of the J&K Constitution Act read with S. 22 of the Letters Patent, the High Court has power of superintendence over Courts over which it has rovisional or appellate jurisdiction. As S. 21 of the Houses and Shops Rent Control Act, 2009. Sub-s. (5) empowers the High Court to hear revisions from an order of the District Judge passed in appeal against the order of the Controller it can exercise superintendance over the Court of the Controller as well.

The power of superintendence should be exercised very sparingly and only in those cases where a party is likely to suffer irreparable damage in case an order of the Court is allowed to stand. When there is another remedy open to a party the power of superintendence of the High Court cannot ordinarily be invoked and therefore when a final order passed by the Rent Controller in a case will be appealable and the aggrieved party would then have a right to get any error rectified the High Court will not interfere with an interlocutory order passed by this authority.

Bodhraj V. Gurcharandas Civil Revn. No. 103 of 2010 D/- 10- 2- 54.

54. AIR 1955 J&K 29 (H. C.) D. B.

LIMITATION —— Occupancy rights transferred by a deed of sale deed dated 29- 11- 1994 — Sale deed registered on 2- 1- 1995 — Suit for declaration that the sale deed was void ab initio brought on 2- 1- 2001 — Suit beyond time.

Held that under section 47 of the Registration Act a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of registration. From this it is clear that the transfer of occupancy rights took place on 29- 11- 1994, and according to section 66 of the Tenancy Act the period of 6 years will begin to run from this date and not from the date of the registration of the sale deed. The suit having been brought on 3- 1- 2005 i. e. after 6 years one month and some days from the date of the execution of the sale deed is clearly beyond time. AIR 1936 Cal. 17 dissented from. 1934 All. 70, 35 I. C. 347; 1937 Nag. I, 1927 P. C. 42, 1928 P. C. 86, 1926 All. 549 referred to.

Bhagat Ram V. Th. Kishan Singh & Ors. Revenue IInd Appeal No. 20 of 2004. 7 J&K LR 243 (Board of Judicial Advisers)

Limitation Act (IX of 1995) — Section 5 — Extension of period of limitation — Application for bringing in the legal representatives of Respondent died before the filing of appeal — Application made after the period of limitation — Negligence of the Advocate as well as of the party — Extention not allowed.

Held that negligence of the parties' agent is in law the negligence of the party himself. It is not a sufficient cause for delay. No doubt in some cases the Court has shown favour to the party where it was proved that the party has been deligent though the Advocate was negligent.

When limitation arises at the time of the filing of application the rights of the opposite party acquired under the Limitation Act are taken to be sufficiently guarded.

Mst. Sarwar Sultana Begum, Versus Sultan Mohd Feroz Din Khan & Ors. Civil IInd Appeal No. 98 Of 2002. 7 J&K LR 78 (H. C.) D. B.

LIMITATION ACT (No. IX of 1995) — Section 5 — Extension of period of limitation — "Sufficient cause" explained.

Held that when a mistake is not after due care and attention it cannot be said to be sufficient cause for the delay. Nothing shall be done in good faith which is not done with due care and attention.

Suraj Bhat V. Jia Lal Bhat Civil IInd Appeal No. 305 Of 2003 7 J&K LR 110 (H. C.)D. B.

Limitation Act (IX of 1995) — Sections 6 and 9 — Suit for possession of land — Transfer in favour of widow by a will in consideration of dower debt — Widow remarries when plaintiff a reversioner of widow's husband is a minor, and minor's father, as revisoner does not seek any remedy — Wnether plaintiff entitled to possession as reversioner and his suit not barred by limitation.

Held that where several persons have distinct causes of action in respect of the same matter, distinct periods of limitation will apply.

Thus it has been held that if a presumptive reversioner has failed to sue, the remote reversioner who happens to be a minor at the time when succession has opened, can avail himself of the benefit of section 6 and section 9 does not come into operation in such a case. The plaintiff having filed suit on attaining majority it is not barred by limitation.

AIR 1944 Lh. 409 (F. B.) Followed.

Mir Haidaer Shah V. Latifullah Shah, Civil IInd Appeal No. 73 of 2004, 7 J&K LR 123 (H. C.) D. B.

(b) Limitation Act (1908), S. 8 —— Ordinary period expiring after three years.

Under S. 8. the period can be extended upto an extent of three years if under the ordinary law out of the period of limitation prescribed, there remains a period of less than three years for bringing a suit. But if the period remaining is more than three years, no extension can be granted.

Anno. Lim. Act. S 8 N. 4

Lok Nath V. Rohlu Ram, First Appeal No. 29 of 2006 D/- 19 Baisakh 2008 AIR 51 J&K 25 (H. C.) D. B.

Limitation Act (IX if 1995) — Article 10 — Period of one year to enforce right of pre-emption — Period begins to run when the purchaser takes, under the sale sought to be impleaded, physical possession of whole of the property sold, or where the subject matter of the sale does not admit of physical possession, when the registration of the instrument of sale is completed — All the lower Courts were of the view that where a fractional share of a tenure is sold the subject of sale can never admit of physical possession and plaintiff's suit was declared as time barred by all the lower courts. No objection taken in any lower Court regarding the correctness of this view. Board refused to interfere.

Held that assuming that cases are conceivable in which a fractional share can admit of physical possession (a question on which the Board express no decisive opinion) the appellant is precluded by his conduct from questioning the correctness of the view of the lower court.

Ajab Din V. Mohammad Khan & Anr. Civil Appeal No. 10 Of 1947, 7 J&K LR 240 (Board of Judicial Advisers).

Limitation Act (IX of 1995) — Section 14 — Exclusion of time proceeding bonafide in court without jurisdiction.

Suit for accounts instituted against T. by K. on the ground of former being latter's agent. The allegations made in that suit were controverted by T. and he advanced his own claim against K. and undertook to pay court fee for such sum as would be found due in his favour. That suit was dismissed for default on 28th Bhadoon 2001. An application for restoration was made by K. but that too was dismissed. A suit was then brought by T. Question of limitation raised.

Held that T. is entitled to the benefit of Section 14 of the Limitation Act in the circumstances.

Pt. Tara Chand Kaul V. Bk. Keshore Nath, Civil Revision No. 65

Of 2004, 7 J&K LR 131 (H. C.) Single Bench.

Limitation Act (1908), S. 14 — Suit must be based on same cause of action.

One of the requisites of S. 14 is that the former and the latter proceedings must be founded upon the same cause of action. In this view, the time spent by a person claiming as full owner without avail in trying to eject the holder of certain land as trespasser through the Revenue Court cannot under S. 14, be excluded in a subsequent suit filed by the same person in civil Court basing his rights as a tenant. AIR 1916 Cudh 155, Rel. on Anno: Limitation Act, S. 14 No 17.

Ali Kitchlu V. Masjid Bolia Kak through Habib Sheikh, Revn. First appeal No. 82 of 2008, D/- 22- 9- 1952. AIR 1953 J&K 17 (H. C.) S. B.

(a) Limitation Act (1908), Arts. 44, 142 — Suit for possession.

In spite of the fact that the suit is for possession of the property alienated during the minority of a person, it has yet to be brought under Art. 44 within three years from the date when the person attains majority. The suit ls not governed by Art. 142. Case Law relied on
Anno. Lim. Act, Art. 44 N. 2, 7a

Lok Nath V. Rohlu Ram, First Appeal No. 29 of 2006, D/- 19 Baisakh 2008, AIR 51 J&K 25 (H. C.) D. B.

Limitation Act (1908), Arts. 36 and 116 — Tort arising as a result of breach in terms of contract — Article applicable — Bar of suit under S. 28, Exception 1, Contract Act — (Contract — Act (1872), S. 28, Exception I) — AIR 1925 Sind 209 and AIR 1929 Sind 55, Dissented from.

Article 36 will apply only if the malfeasance etc., is independent of contract. If it is not independent of contract, the Article has no application. A tort may certainly arise independent of contract but it can also arise as a result of a breach in the terms of a contract. Thus where the Government undertook to return the leased property in the same condition in which it was received, with all damage repaired, if such damage was caused by an act of their own negligence or that of their servants and the lease deed also made a provision for reference to arbitration in case of disputes and differences arising between the parties, and the houses leased having caught fire and completely gutted due to wilful negligence of Government servants, the lesser claimed compensation.

Held that the acts complained of were not independent of contract and as such Art. 36 could not be made applicable and the only other Article which would apply would be Art. 115. AIR 1926 Sind 209 and 1929 Sind 55. Dissented from. Chitaley's Limitation Act, p. 1150, rel. on.

Held further that even if Art. 36 were made applicable yet the claim would not be barrediin view of S. 28, Exception 1, Contract Act. AIR 1929 Sind 55, Rel on. Anno. AIR Com.: Lim. Act. 36 N. 2: Art. 115 N. 3. AIR Man.: Con. Act S. 28 N. 5.

Cases Referred:

AIR 1926 Sind 209: 19 Sind LR 24
AIR 1929 Sind 55: 107 Ind Cas 435

AIR 1932 Cal 85 : 58 Cal 930
AIR 1958 Mad 480 : 1953-1 Mad LJ 340
(1936) 1936-1 KB 399 : 105 LJ KB 309.

C. Rai V. Union of India, First Appeal No. 46 of 2011, D/- 2- 8- 1955. (Appeal from the order of Wazir C. J.) AIR 1955 J&K 36 (H. C.) D. B.

Limitation Act (1908), Arts. 85 and 53 —— Scope and applicability.

Article 115, Jammu and Kashmir Limitation Act (corresponding to Art. 85 of Indian Limitation Act) Visualizes the existence of independent obligations on each side and it further presupposes that there must be a mutual account and reciprocal demands between the parties. The expression 'mutual account" has been taken to mean an account in which the parties have agreed to bring together their items of debits and credits relating to their mutual dealings with a view to set off against each other and arrive at a balance. This would mean that there must be mutual delaings between the parties gifing rise to independent abligations on both sides. This would naturally give rise to mutual demands. The real test, therefore, would be to see whether there have been reciprocal demands in any particular case, i. e., whether there is a dual contractual relationship between the parties.

Under an agreement for purchase of grain entered into between the plaintiff and the defendants the plaintiff was to supply to the defendant a certain quantity of grains at specified rates during specified periods. A certain amount was taken as advance by the plaintiff on the date of the execution of the agreement and further advance was to be made within fifteen days. It was also stipulated that the amount due on account of the supplies made at the godown in a month will be received at the end of the month. This document was however not acted upon in toto and its terms were altered by mutual conduct of parties. The supplies were not made during periods specified and it was not at all proved that any monthly adjustments were made by the parties or that any payments were made on monthly basis. The actual mode followed was as follows. As against the advance the defendant received deliveries of grains from the amount advanced at a particular time. When again payments were made by the defendant which exceeded the made. The plaintiff again made deliveries price of deliveries — which exceeds the payments. Thus, the balance was shifting and was at one time in favour of one party and at other in favour of the other. The plaintiff brought a suit for recovery of the balance of price of grains delivered within six years from the date when the last item of grains was delivered.

Heid that the case was not one of simple sale of goods and as such Art. 53 had no application to the facts of the case. The facts of the case clearly disclosed that there were reciprocitory of dealings and transactions on each side creating independent obligations on the other and that the account remained mutual, open and current and as such the suit was within limitation under Art. 115 Jammu and Kashmir Limitation Act. (Corresponding to Art. 85 of Indian Act). Chitaleys' Limi. Act, 3rd (1952) Edn. P. 1440, Art. 85 N. 3, Ref.

Anno. Lim. Act, Art. 53 N. 1 : Art. 85 N. 3.

Cases Referred.

AIR 1940 All. 209, ILR 1940 All 147
1942 Pat 201 ; 197 Ind cas 449
1939 Nag 113 ; ILR 1941 Nag. 222
1924 Pat 107 : 74 Ind Cas 831
1945 Mad. 467 ; ILR 1946 Mad 325
1940 Mad 887 ; 192 Ind Cas 350
1953 Trav-C 391 ; 1953 Ker LT 332
1953 Sau 141
1922 Pat 364 : 66 Ind Cas 30
1943 Mad 13 : 207 Ind Cas 133
1940 Bom 158 : ILR 1940 Bom 127
1921 All 325 : 63 Ind Cas 435

L Lal Chand & anr. V. Hindustan Forest Co. Ltd. First appeal No. 1 of 2009, D/- 11- 12- 53. AIR 1954 J&K 49 (H. C.) D. B.

Limitation Act (1908), Art. 113 — Starting point — No date fixed for performance and no notice of refusal — Suit is not barred — (J. and K. Limitation Act (9 of 1995), Art. 84).

Where in a contract of sale of land no date of performance is fixed, there was no demand for performance or refusal to perform and there was no notice or knowledge that contract was repudiated there is no period of limitation for a suit for specific performance (Suit filed ten years after the contract held not barred) Anno. Limitation Act, Art. 113 N. 8.

Kharku & Ors. V. Rasil Singh & Ors. Civil Appeal No. 3 of 1950 D/- 15- 6- 1953. AIR 1954 J&K 33 (Board of Judicial Advisers)

Limitation Act (1908), Arts 120, 123, 142 - 144 — Suit for distributive share of deceased's property.

Father A a Muhammadan died in 1994 leaving behind a son W and a daughter S—Mutation of deceased's property effected in S. 2002 in favour of W ignoring S—On death of W. another mution in S. 2005 recorded in favour of W's two daughters and S included in that mutation —S coming in possession of property mutated in her favour in the same year. Suit by S in S. 2006 for declaration that she was khana-nashin daughter of A and as such was entitled to one-half share with her brother W in their father's estate—Averment that her title was denied by heirs of W in 2006—At its worst cause of action would have arisen in S. 2002 when first mutation was effected in 2002 and S was excluded —That being within 6 years suit held was within time —Even on point of possession, period between death of A in S. 1994 and S coming into possession of property in S. 2005 held was much less then statutory period of 12 years. Anno. Limitation Act, Art. 120, N. 32 Art. 123 N. 4 : Arts. 142-144 N. 45

Mst Safia V. Mst. Fatima & Ors. 2nd Appeal No. 29 of 2009, D/- 10- 3- 1953, AIR 1953 J&K 39 (H, C.) D. B.

Limitation Act (IX of 1995) Article 134 — —

Article 134 of the State Limitation Act, applies to suits "to recover possession of immovable property conveyed or bequeathed in trust or mortgaged and after-wards transferred by the trustee or mortgagee for a valuable consideration." It is wholly incorrect to say that any one acquiring possession from the mortgagee during the subsistence of the mortgage can invoke Article 134 in his favour.

Kripa Ram V. R. B. Th. Kartar Singh & Ors. Civil Appeal No. 11 Of 1949, 8 J&K LR 28 (Board of Judicial Advisers)

(a) Limitation Act (1908), Art. 141 — Applicability — Suit by one co-heir against another.

Article 141, Lim. Act, contemplates that the person against whom the suit is brought is a total stranger who got into possession of the property after the death of the female and not to the case where some of the co-heirs get into possession after the death of the female, as their possession is presumed to be on behalf of all.

Anno. Lim. Act, Art. 141, N. 2, 12.

Ahmad Dar V. Mst. Mukhti Second Appeal No. 16 of 2007 D/- 6-9-1951. AIR 1951 J&K 21 (H. C.) D. B.

Limitation Act (1908), Art. 142 — Suit held barred by adverse possession

Deceased leaving natural son and son adopted away in another family — Mutation in favour of sons — Name of adopted son put in, with knowledge of another son, though the former had no legal right — Adopted son going into pessession of part of property—Possession continuing for more than 12 years without challenge from another son who was rightly entitled to it — Suit by him for possession held barred. Anno. Lim. Act, Arts. 142 and 144 N. 63, 76.

Rugho Ram V. Shiviji, Civil Appeal No. 3 of 1953 D/- 19-6-1953. AIR 1954 J&K 25 (Board of Judicial Advisers)

Limitation Act (1908) Arts. 142 and 144 — Co-sharers — Partition proceedings — Starting point of limitation

Under the law in force in the State of Jammu and Kashmir it is the date of the preparation of the instrument of partition from which the period of limitation starts against the co-sharer and the not from the date mentioned in the instrument.
Anno : AIR Com. Limitation Act, Art. 142 N 38

Cases Referred

AIR 1924 Lah 155 : 73 Ind Cas 665

Multan Singh & Ors. V. Suraj Singh & Ors. Letters Patent Appeal No. 1 of 2011, D/- 9-1-1956 — AIR 1956 J&K 25 (H. C.) D. B.

Limitation Act (1908), Arts. 142-144 — Possession of Co-owners.

Where co-owner A purports to execute a deed of gift in favour of the other co-owner B who is already in possession of the property but the deed is not registered, and the cricumstances pointed to the conclusion that the parties to the transaction abandoned all idea of the gift taking effect, the character of the possession of B remains the same as it was before the contemplated gift.

Anno. Lim. Act, Arts. 142 and 144, N. 35.

Thoppi V. Paras Ram — Appeal No. 5 of 1950 decided by the Board of Judicial Advisers on 2-7-1950. AIR 1951 J&K 27 (Board of Judicial Advisers).

Limitation Act (1908), Art. 144 — Adverse possession — Burden of proof — Nature of evidence.

It is a fundamental principle of law that when the question of acquisition of title by adverse possession has to be determined,

clear and definite evidence relating to different points of time should be accused by the person who assers that his possession has been adverse for a statutory period and he has thus acquired title by prescription. Anno. Limitation Act. Articles 142 and 144 N. 87, 97.

Garibu & Ors. V. Bh. Lakhshmi Narain Civil 2nd appeal No, 45 of 2006 -- D/- 14- 11- 1952. AIR 1952 J&K 24 (H. C.) D. B.

(b) Limitation Act (1908), Art. 144 — Coheirs — Nature of possession — Suit by one to recover possession — Article applies.

When a Mohammadan owner dies leaving several heirs they all become co-owners and tenants-- in— common. A joint owner is legally entitled to retain possession of joint property. Even if he is in exclusive possession of such joint property, his possession is ordinarily to be referred to his legal title. The presumption therefore is that his possession is lawful and therefore on behalf of all the co-owners. The other co-owners are accordingly in constructive possession of the property, As distinct shares have devolved on them, they all are presum d to have taken their legal shares although possession still remains joint. If therefore the co-owner in actual possession dispossesses any one of the other co-owners, the suit that is brought for recovery of possession is not a suit for a distributive share of the property of an intestate, but is a suit to recover possession of the defined, though undivided, share of the co-owner in the possession of the other co-owners. Such a suit falls under the general Art. 144, Limitation Act, limitation running from the date when the defendant's possession became adverse. AIR (15) 1928 All. 467, Rel. on

Anno. Lim Act, Arts. 142 and 144, N. 44

Ahamad Dar V. Mst. Mukhti, 2nd Appeal No. 16 of 2007, D/- 6-9- 1951. AIR 1951 J&K 21 (H. C.) D. B.

(c) Limitation Act (1908) Art. 144 — Possession of co-owners — — Ouster — What constitutes — Mere mutation does not.

Mere mutation on the part of a co-owner in his favour would not constitute sufficient ouster of the other co-owners who are presumed to be in constructiv possession There should be some overt act to the knowledge of the other co-owners to show that the co-owner in possession is holding the property exclusively for himself and denying the title of other co-owners. AIR (9) 1922 All. 399. Rel. on.
Ann. Lim Act, Arts. 142, 144, N. 35

Ahamad Dar V. Mt. Mukhti, 2nd Appeal No. 16 of 2007, D/- 6-9- 1951. AIR 1951 J&K 21 (H. C.) D. B.

Limitation Act (IX of 1995) — Article 149 — Suit by or on behalf of the State — Period sixty years. When suit is not by or on behalf of the State the period of twelve years under Article 142 or Article 144 applies.

Article 149 prescribes sixty years as period of limitation for a suit by or on behalf of the State. This Article does not contemplate a suit against the State. A suit for possession of immovable property was brought by a person who was a lessee of that property for a period of forty years from the Government. He impleaded the Government and another person S. M. as defendants. Both the defendants contested the suit. The pleas taken on behalf of the defendant S. M. were that he was himself the owner of this property

and in any case he was in adverse possession as against the plaintiff.

Held that it would be difficult to presume that the suit either in terms or by implication is for the benefit of the State. In this view it will not be difficult to imigine that the terms of Article 149 would not be applicable in this case.

I. L. R. 32 Cal 129 (P. C.) and AIR (33) 1946 Nag. 228 referred to.

Mohammad Pampuri V. Sona Mir & Anr. Civil 2nd appeal No. 254 of 2002; 6 J&K LR P. 11 (H. C.) Single Bench.

Limitation Act (1908) Art. 182 — Revival of application

The question wether an application is only ancillary to a previous application or is a fresh application depends upon the circumstances of each case and is to be decided in refrence to the order passed thereon. Where a previous application has been stayed or consigned to records and the second application is similar in scope to the previous one, it will be treated as am ancillary application in continuation of the previous one. If, however, the character of the application is changed and fresh reliefs are sought by means of a subsequent application then it may come within the purview of a fresh application. Similarly if the proceedings on the prior application have come to an end, then the subsequent application would certainly be a fresh application. Where the order that had been passed was simply that 'the decree-holder is not present nor is his Mukhtar present. Let this application be consigned to records. The Attachment of the house shall remain intact", this would show abundantly that the execution proceedings were not brought to a close. but that they were kept pending. If the subsquent application presented contains only much that the previous application was simply consigned to records and that the attachment of the house was kept intact and the prayer made is that the attached house be put on sale and this is exactly what was prayed for before there is not a fresh relief sought but all that is prayed for is a revival of a previous application. AIR 1950 Cal. 12, dis.

Ann. Lim. Act Art. 182 N. 143.

Hiranand Dobey V. Jyoti Ram Goel, First Appeal No. 6 of 2008, D/- Ist Chait 2008, AIR 1952 J&K 3 (H. C.) D. B.

Limitation Act (1908), Art. 182 (2) — "Where there has been an appeal"—Appeal against order refusing to set aside exparte decree

Clause (2) of Art. 182 of the Limitation Act does not state in its strict gramatical construction, that the appeal must be against the decree in the suit. Where there has been an appeal against the order of the trial Court refusing to set side the exparte decree the limitation for execution of the decree shall start from the date of the order dismissing the appeal and not the date of the decree of the trial Court AIR 1932 PC 165 Applied. AIR 1237 Pat 337 Relied.

Anno. Limitation Act Art. 182 N. 34, 46.

Mst. Rahati V. Gh. Mohd Soofi & anr. Second Appeal No. 87 of 2007. D/- 22 Assuj 2008, AIR 1952 J&K 16 (H. C.) D. B.

Limitation Act (IX of 1995) — Article 182 (5) — — Application

for execution of decree not verified as required by Order 21, Rule II, C. P. C. — — Whether application "*in accordance with law*" — Whether such application can be allowed to be amended after the application is dismissed.

Held that an application for execution of decree not verified as required by O. 21, Rule II, C. P C. is not in accordance with law within the meaning of Article 182(5) Limitation Act, 1995—Where an unverified application for execu ion is presented under O. 21, R. 11 C. P. C., the Court may direct the applitcant to amend it by supplying the defic ency under O. 21, R. 17. This, however, can be done only during the pendency of the proceedings and not when that application is dismissed and the court is seized of proceedings started by a fresh application.

Pt. Tara Chand Zutshi (Jd. Applt) Versus Prem Nath Kanaw (Dh. Respdt) Civil Appeal No. 19 of 1947, 6 J&K LR page 171 (Board of Judicial Advisers).

Limitation Act (1908), Art. 182 (5) — Last application not in accordance with law — Objection not raised in execution proceedings but in appeal — Objection held not maintainable.

An execution application was allowed to proceed by the execution Ct. In the appeal by the judgmentdebtor., it was argued for the first time that the previous execution application was not filed by a properly authorised person & as such was not in accordance with law. The objection was not even mentioned in the memorandum.

Held that under the circumstances it was not fair to the Decree-holder to allow the Judgment-debtors to raise the point in the appellate Court.

Prabha Dial and Ors. V. Hans Raj & Ors. Appeal No. 9 of 1950 decided by the Board of Judicial Advisers on 12- 6- 1950. AIR (38) 1951 J&K 8.

Limitation in Pre-emption suit.

The law of limitation in this State, in relation to suit for pre-emption, is contained in Article 10 of the first schedule of the Limitation Act and section 29 of the Right of Prior Purchase Act. Under Article 10 one year's period provided for such suit commences when the vendee takes physical possession of the whole of the property sold or where the subject of the sale does not admit of physical possession when the registration of the instrument of sale is completed. Section 29 of the Right of prior purchase Act which supplements Article 10 of the Limitation Act provides two starting points in the case of sale of agricultural land,—

(1) the date of attestation if any of the sale by a revenue officer having jurisdiction in the registration of mutations maintained under the Land Revenue Act. or (2) the date on which the vendee takes under the sale physical possession of such land or property whichever dat shall be earlier. The words "sale" occurring in section 20 must, in view of section 138 Transfer of property Act be taken to mean a valid and operative sale. Any other interpretation of that term will militate against the spirit, of the Statute Law in force in the State.

To make section 29 applicable it is not necessary that the physical act of taking possession should take place afresh where a vendee has already taken possession in anticipation of a registered

instrument. In such a case the mental act of holding the property under a title perfected by registration is tantamount to taking physical possession under the registered deed.

Jamal Din V. Gopal Singh & Ors. Civil Appeal No. 15 of 1947. 6 J&K LR page 113 (Board of Judicial Advisers).

Lunacy — Allegation of accused being lunatic —— Magistrate by interrogation finding no unsoundness of mind — Whether order for medical examination under S. 464 contrary to the section.

Held that the Magistrate can order the medical examination of the accused under section 464 Criminal Procedure Code only when he has made up his mind as regards the unsoundness of the mind of the accused. It is only after the Magistrate finds that there are reasons to believe that the accused is of unsound mind that he can order his medical examination.

Obviounsly a Iunatic cannot be forced to pay for medical examination nor any other accused if there be one arraigned along with the Iunatic.

Des Raj V. Makhan. CR Revision No. 23 Of 2005, 7 J&K LR 64 (H.C.) S. B.

Malicious prosecution — Essentials — Effect of dismisal of Criminal case.

There is no presumption with respect to criminal proceedings that they were wrongly taken, if the proceedings fail in a Court of Law. It is therefore, necessary for the plaintiff in a suit for malicious prosecution to prove not only that he must also show that there was no probable or reasonable cause for the complainant to have started proceedings in the case.

Gh. Mohd & Ors. V. Mohamadoo, Second Appeal No. 33 of 2009, D/- 22- 2- 1953, AIR 1953 J&K 21 (H. C.) S. B.

Malicious prosecution — Requistes for — meaning of malice.

The plaintiff, in order to succeed in a suit for malicious prosecution, has to prove that the defendant was actuated by malice and that he had acted without reasonable and probable cause. The mere fact that the complaint filed by the defendant against the plaintiff was dismissed and the plaintiff was discharged does not render the defendant liable for malicious prosecution. Malice has been said to mean any wrong or indirect motive but a prosecution is not melicious merely because it is inspired by anger. However wrongheaded a prosecutor may be, if he honestly thinks that the accused has been guilty of a criminal offence he cannot be initiator of a malicious prosecution. AIR 1944 PC 1, Rel. on.

Case Referred

AIR 1944 PC 1 : 45 Cri LJ 303 (PC)

Gopa V. Amarnath & Ors. 2nd appeal No. 35 of 2011 D/- 17- 2- 55. AIR 1955 J&K 27 (H. C.) D. B.

Mesne Profits — Suit for recovery of ancestral joint Hindu family property whether lies in a Civil Court.

Held that a suit for the recovery of mesne profits does not lie in a Civil Court.

Further held that the record of status in the Record of Rights is not a necessary qualification. This is supported by the definition

in clause (7) of section 2 of the Tenancy Act, which says "tenant" and "landlord" includes the predecessors and successors in interest of a tenant and landlord respectively.

Madan Lal V. Dharam Singh. Civil First Appeal No. 102 Of 2002. 7 J&K LR 6 (H. C.) D. B.

Mistake of the court — party not to suffer for it.

It is true that an sppeal must be presented by an authorized person, and if it is presented by a person who is not authorised to do so, it shall be rejected. But where an appeal is presented by an authorized person, but in a wrong court and that court instead of returning the appeal to the appellant, itself sends it to the proper court which accepts the presentation, the appellant should not be made to suffer for the mistakes of the Court on the principle' actus curiae neminem gravahit: , and the appeal should not be dismissed.

Anno. C. P. C. O. 41, R. 1 N. 2.

Ganju & Ors. V. Lassa Zargar & Ors. Rev. 1st. appeal no. 23 of 2008, D/- 5- 4- 54. AIR 1954 J&K 44 (H. C.) S. B.

Mortgage — Entered under mistaken notion of law — No compliance with legal formalities — Mortgager suing for possession — right of mortgagee to recover consideration money before restoring possession—

Where parties enter into a mortgage under a mistaken notion of law without fulfilling the legal formalities which has made the agreement unenforceable at law, and the mortgager brings a suit for possession which had come into the defendants' possession as a result of the so called mortgage, in such a case S. 65 would apply and the plaintiff would be bound to pay back the consideration received by him before possession is restored to him. AIR 1936 All. 215 Rel. on.

Case Law Ref.

Anno. AIR Man., Con. Art, S. 65 N. 5, AIR Com., T. P. Act, S. 59. N. 15.

Th. Ganpat V. Sukhram, 2nd Appeal No. 92 of 2011, D/- 16- 3- 55. AIR 1955 J&K 20 (H. C.) S. B.

Mortgage—Joint Land — Mortgagor co-sharer with others — Mortgagee's suit for possession on the plea that there had been a partition between mortgagor and other co-owners and that the land in suit had been allotted to mortgagor — Defence plea that land was unpartitioned and suit therefore untenable — Partition not proved and suit dismissed — In second appeal new case put forward for the first time that specific portion of land out of the Khewat No. was mortgaged and plaintiff entitled to possession.

Held that a new case has been set up at a very late stage and it has no relation to the facts of the case.

Held further that the principle of law laid down in judicial decisions is correct that where under an arrangement between several co-owners of a joint property, a co-sharer is allotted a defined and joint property as representing his share in it and is in exclusive possession thereof, he is competent to transfer his interest in the same with possession to a third party and such transfer shall be

valid as long as the arrangement between the several co-owners subsists.

AIR 1943 All. 247 (FB) referred to.

Aftab Ram V. Lassu, Civil Appeal No. 4 Of 1947, 7 J&K LR 201 (Board Of Judicial Advisers)

Mortgage — With possession — Suit for redemption — Suit commenced 12 years and a few months after the execution of a void and disputed sale - deed — Plea of adverse possession.

Held, that during the subsistence of a mortgage it is not open to a mortgagee to set up any title by adverse possession to the equity of redemption by a mere unilateral assertion of a hostile title. Possession as long as it can be referred to a legal title cannot be referred to a trespass. The possession of the mortgagee under a void sale-deed without more is, therefore, to be referred to the mortgage and to sale.

Ganpati & Anr. (Defdt. Applt) V. Ram Saran (Plff. Respdt). Civil Appeal No. 23 of 1947 — 6 J&K LR Page 134.

Motive — Merely a link in a chain of circumstantial evidence.

Motive however strong is nothing more than a link in a chain of circustances establishing the guilt of a person. At the same time mere non-establishment of motive would not be a sufficient gicund to order the acquittal of an accused,

Anno. Penal Dode, S. 302 N. 14.

Ali Shah V. State, Cr. 1st Appeal No. 16 of 2010, D/- 29- 3- 54. AIR 1954 J&K 42 (H. C.) D. B.

Motor Vehicle Act (I of 1975) — Section 16 — — Overloading — prosecution did not lead any evidence whatever as to the nature of the fact of over - loading and indeed there is nothing on the record to suggest as to what the over-loading consisted in — According to the trial Court the accused pleaded guilty to the charge of over-loading to avoid waste of time in contesting complaint and fined Re. 1.

Held that it is not obligatory upon a Court to record a conviction on an unconvincing and false plea of guilty. Besides, in recording a conviction under the Motor Vehicles Act for over-loading it was necessary to ascertain what was the over-load. If the driver was carrying in the lorry. alongwith its prescribed quota of passengers and goods, a mescot in the shape of a pet rabbit, it would be over-loading technically but it would be the height of officiousness to challan such a case and certainly quite undesirable to record conviction.

State V. Dharm Singh, C R Reference No. 146 Of 2003, 7 J & K LR 38 (H. C.) Single Bench.

Motor Vehicles Act (XII of 1998) — — — Section 123 — — — Accused convicted under section 16 of the Old Motor Vehicles Act of 1975.

Held that a wrong section having been applied to the facts of the case, the accused has been deprived of proving the exception which section 123 lays down. Therefore, the conviction under section 16 of an Act which no longer has its place on the Statute Book

is deffinitely illegal.

State V. Mohd Akram, Criminal Reference No. 149 Of 2003, 7 J&K LR 182 (H. C.) S. B.

Muhammadan Law — Respondent's ancester had been separated by his father and put in separate and exclusive Possession of certain Portion of land – Rest of the land after the death of the ancestor's father mut ted only in the name of the appellants, his other sons and sons—in — law — Respondents' ancestor recorded as co — sharer with regard to the portion of the land in question he was recorded as a tenant paying rent either in cash or in kind — — For about 30 years the revenue record continued to show the above enrties — — Appellants had also got the respondents ejected by a decree of a Revenue Court — Whether respondents can claim title to the land by right of inheritance.

Held that the mere fact that some property was given to the respondents ancester by his father in his life-time could not disentitle the respondents, ancester in law to claim any share in his father's inheritance after his death but it was epen to the respondents, ancester voluntariiy not to claim such a share by reason of the previous allotment made to him by his father. And the fact that his name was not recorded along with his brothers and brothers-in law in the remaining inheritance of his father leads to the inference that he renounced his right in the remaining inheritance of Umar.

Further held that it is not possible to ignore the long continu d revenue entries, the surrounding circumstances of the case and the ejectment of the respondent by the Revenue Court at the instance of the appellant and to refer the possession of the respondent to a title by inheritance and not to a title by any tenancy.

Shaban Malla V. Lasso & Gani, Civil Appeal No. 6 of 1948, 8 J&K LR 80 (Board of Judicial Advisers).

Muhammadan Law — Marriage — Minor — Right to repudiate — Marriage of minor daughter contracted with consent of father —— No option to repudiate on attainment of puberty.

Under the Muhammadan law, the understanding is the essential sine qua non of a capacity to enter into a marriage contract and even if a boy or girl has attained the age of puberty, if he or she is devoid of understanding, there cannot be any valid marriage under any circumstances whatever. In the case of a boy or a girl who has attained the age of puberty, the marriage is not valid unless the legal guardian has consented to it. It the guardian happens to be the father who has consented to the marriage then the minor cannot exercise her option of avoiding the marriage on attaining puberty. AIR 1938 Cal. 71, Disting.

Mst. Khatji V. Rehman Wani 2nd Appeal No. 80 of 2006, D/- 31st Jeth 2007, AIR 1952 J&K 43 (H. C.) D. B.

Muhammadan LaW — Marriage — Parties governed by Hanifee law — Suit for conjugal rights — Revocability of a marriage contract made by or on behalf of a minor Muslim girl —— Effect of J&K Dissolution of Muslim Marriage Act (X of 1999) coming into force during the pendency of the suit and after the attainment of age of 18 years by the girl.

Held that age of puberty under Hanifee law for a Musilm

girl ranges between 9 and 15 years, the former being the lowest limit and the latter being its highest limit. It is a question of evidence in each case whether a particular minor girl has or has not attained puberty. But in the absence of all evidence the presumption of law is that a minor Muslim girl attains puberty on completion of her 15 th year. The law on this subject was authoritatively stated by Lord Atkinson in Mst. Atika Begum versus Mohammad Ibrahim Rashid Nawaz, AIR 1916 PC 251

A marriage made by a minor girl who has not attained puberty but who is possessed of discretion and understanding and which is assented to by her guardian, is undoubtedly a valid marriage but such a marriage derives its validity and force by the assent of the guardian and it stands in the same position as the marriage contracted by the guardian with all the rights and liabilities and legal incidents which flow from a marriage contract made by the guardian. Further held that the Act only consolidates and clarifies the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and it does not confer or create any new right and obligations. Section 2 of the Act provides that a woman who is the wife of a person according to the Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on certain grounds. As the right is given to a woman who is the wife of a person to a decree for dissolution it necessarily implies that any wife on the date of the enforcement of the Act is entitled to seek relief under the Act, The Act therefore brings within its operation marriages which had taken place prior to the enforcement of the Act under the provisions of the Act.

Momin Shah V. Mst. Mohd Jan & Ors. Civil Appeal No. 6 Of 1947, 7 J&K LR 204 (Board of Judicial Advisars).

(b) Muhammadan Law — Succession — Agnate — Meaning — Words & Phrases.

Agnate means a person whose relation to the deceased can be traced without the intervention of female links.

Ahmad Dar V. Mt. Mukhti. Second Appeal No. 16 of 2007. decided by the High Court on 6-9-1951. AIR (38) 1951 J&K 21 (H. C.) D. B.

Muhammadan Law — Succession — Custom

Acustom supersedes the ordinary law so far as it is proved and everything beyond the proved custom must be governed by such law. Where a Muhammadan dies leaving his mother and a brother, their shares according to Muhammadan Law, are; mother 1/6 th and brother the remaining 5/6 th both taking in absolute right. The Muhammadan Law, however, stands superseded by a custom under which the mother instead of taking 1/6 th in absolute right takes the whole for life and the brother, instead of taking only 5/6 th immediately, takes the whole after the termination of the interest of the mother. The life interest becomes vested in the mother and the remainder becomes immediataly vested in the brother. The daughters of the brother do not succeed collaterall, but they succeeded to the vested interest which their father possessed and though the latter died in the life-time of the mother his interest doesnot cease but devolves upon his daughters who became entitled to the share after the termination of the limited interest of the mother. The transferee from the mother having taker

transferees of property in which his transfer had only a limited interest cannot be entitled to any payment by the daughters as a condition precedent to a declaration being granted to them. 29 Cal. 828 PC Rel. Cn.

Ahad Lone V, Mst. Azizi, Civil Appeal No. 14 of 1950, D/- 1-8-1059, AIR 1952 J&K 11 (Board of Judicial Advisers)

Municipalities—Jammu and Kashmir Town Area Act (VII (7) of 1897),S. 38(1) Proviso—Notice can be waived—Plea of want of notice taken at late stage when limitation for fresh suit had expired—Plea held waived—(CIVIL P. C. (1908), S. 80)

Before an action is brought against a Town Area Committe or against any servant of a Town Area Committee in respect of anything done, one month's notice has to be given to the Town Area Committee. The notice is for the protection of the Committee and it is for the committee to insist upon the notice or to waive it.

Plea of want of notice which is a clear bar to the institution of proceedings against public officer must be taken at the earliest possible opportunity and must be specifically pleaded. Where such a plea is taken by the defendant at a very late stage of the suit and at a time when the plaintiff would be precluded by the law of limitation from bringing a further suit against the defendant, the defendant must be deemed to have waived the privilege of notice. AIR 1931 Cal. 175. Rel. on AIR 1947 PC 197. Disting.

TAC Sopore v. Abdul Khaliq. Civil Revn. No. 7 of 2009 D/—14 Sawan 2009 AIR 1952 J&K 47 (H. C)C. J.

Muslim Law — — Interpretation of agnats (verses from Quran - Sharief) and *H*disis (Saying of the Prophet) and other books of Theology contrary to well established interpretation placed by such commentators as Muffasirs and Muhaddises accepted throughout world i. e. well established rules of Fiqa as evolved by the Faqirs (Doctors of Muslim Law) and accepted by the Judicial Courts in India whether permissible to a judicial officer — disrespectful references to non-muslim judges and distinguished text book writers as Sir D. F. Mulla and Sir Syed Amir Ali eminent Judges of the Calcutta High Court severely deprecated and condemned. True sources of Muslim Law enunciated.

Held that however learned the Tehsildar Magistrate might be in thoclogy, he should have known that he was acting as a Judicial officer, and it was not for him as such officer to give his own interpretations of the verses of the holy Quran. Times without number the highest Judicial Courts in India including the Privy Council have sounded a note of warning against entertaining new and novel interpretations of the texts of the Quran and Hadis by persons who are not recognized as competent to give such interpretations. So far as these are concerned, we have to rely on the interpretation of only yore (Muffasirs and Muhaddises) whose authority is acknowledged throughout the Muslim world.

Not only has the Magistrate given interpretations of the texts of the holy Qaran and of Hadis which render nugatory the well-established rules of FIQA, as evolved by the Faqirs (Doctors of Muslim Law) and accepted by the Judicial Courts in India, but he has made disresectful references to non-Muslim Judges who in the course of their duty have to interpret Mohammadan Law in conformity with the sources of that Law and also to some distinguished text book writers, such as the late Sir Dinshah Fardunji Malla, whose

erudition and lucidity in expression one can gainsay and to Sir Syed Ameer Ali, a profound scholar and eminent Judge of the Calcutta High Court and later a member of His Majesty's Privy Council who has earned a unique place in the legal and Islamic world by his masterly treatises on Mohanmadan Law and the Law of Evidence and by his meritorious services to the cause of Islam. The explanation that the Magisttrate has submitted on the requisition of the Additional Sessions Judge is still worse and deserves the severest condemnation. In this explanation, he has made many undesirable references to the administration of Muslim Law by non-Muslim Judges and has cast reflection on non-Muslim Advocates and I do not think any useful purpose will be served by repeating any of these uncalled for references here.

The Tehsildar Magistrate has entirely forgotten that the Muslim Law, as administered by the Judicial Courts in India, is based not only on "Holy Quran (the word of God), "Sunna" (the sayings and doings of the prophet) but also on "Ijmal-ul-Ummat", i.e., consensus of opinion of the companions and disciples of the prophet and "Qiyas"; that is to say, analogical deductions derived from a comparison of Quran, Sunna and Ijma by those capable of forming judgment in matters in relation to which the above three sources do not offer a clear and direct guidance. Under this heading, in my humble view, would come the different rules of Fiqa which have been elaborated by four great Jurists of Sunnis, namely Iman Abu Hanifa along with his two distinguished disciples, Iman Muhammad and Abu Yusuf, Immam Shafei, Imam Hanbal and Imam Malik and the Imams and Mujtahids of Shias, Muatazilas and of other sects of Islam.

Ahmad Giri V. Mst. Begha, Cr. Ref. No. 221 / 2011 D/- 7- 3- 1955 AIR 1955 J&K 1 (H. C.) D. B.

Natural justice principle of — Judge in one's own cause

Mr Gadkari who had associated him-self with the scheme at one stage or the other was appointed a member of the Commission of Inquiry to judge as to who was to be blamed for the delective working of the scheme. It is pointed out by the learned counsel for the appointment of Mr. Gadkari was not in consonance with the principles of natural justice as he was a judge in his own cause. There is a good deal of force in this contention. From the report of the Commission it appears that Mr Gadkari had tendered his advice and had inspected the working of the scheme. In these circumstances it could not be denied that the Commission so constituted would not give reasonable assurance to the petitioner about its complete impartiality.

Gh. Rasul V State' Misc. Appln No. 23 of 1955. D/- 21- 9- 1955. AIR 1956 J&K 17 (H. C.) F. B.

Natural Justice principle of — Violation hit by Art. 14 Constitution of India.

Violation of the principles of natural justice comes within the purview of Art. 14.

The important principle of natural justice is that a person should not be condemned unheard.

Where a Government servant was demoted on the report of the Commission of Inquiry and he did not know whether he was called upon to meet the charges or whether the Commission was functioning as mere a fact finding Comission and he was not apprised

of the findings on the basjs of which he was punished, there is a clear violation of the principles of natuaal justice and the infringement of the fundamental rights which he enjoys under Art. 14, Constution of India as applied to the State of Jammu and Kashmir.

Cases Referred :

(1917)-1917-1 KB 486
AIR 1951 J&K 1 : 9 J&K LR 180
AIR 1954 SC 447 : 1955 SCR 415 (SC)
AIR 1940 PC 230 : ILR (1940) Lah 685 (PC)
AIR 1955 SC 425 : 1955 SCA 545 (SC)
AIR 1950 SC 188 1950 SCR 459 (SC)

Ghulam Rasul V. State. Misc. Appln. No. 23 of 1955, D/- 27- 9- 1955. AIR 1956 J&K 17 (H. C.) F. B.

Negligence — Negligence of the agent of the party is the negligence of the party — — — Negligence of the Advocate is the negligence of the agent.

Held that negligence of the partie's agent is in law the negligence of the party himself, It is not a sufficient cause for delay. No doubt in some cases the Court has shown favour to the party where it was proved that the party has been diligent though the Advocate was negligent.

Mst. Sarwar Sultana Begum Versus Sultan Mohd Feroz Din Khan & Ors. Civil IInd Appeal No. 98 Of 2002, 7 J&K LR 78 (H. C.) D. B.

Negotiable Instruments (1881), S. 18 — — Discrepancy between amount mentioned in words and amount mentioned in figures.

When a difference arises between the sum expressed in words in the body of the instrument (pronote) and that mentioned in figures on the top in one corner, the amount mentioned in words will be taken to be the sum for which the instrument was made payable. The mandatory nature of S. 18 gives no choice to the Courts to give preference to the sum mentioned in figures over the amount mentioned in words.

Org. Civil Suit No. 54 of 2005, D/- 11- 6- 1954, J&K Bank Ltd. V. Q. Taj Din, AIR 1954 J&K 56 (H. C.) F. B.

New Plea raised for the first time before the Board not entertainable.

Held further that the plea of the defendant-appellant that he became full proprietor before the registration of the sale and no right of prior purchase can exist where, a person acquires title not by transfer but by adverse possession, adopted for the first time before the Board should not be entertained at this stage.

Jamal. Din V. Gopal Singh & Ord. Civil Appeal No. 15 Of 1947 6 J&K LR Page 113 (Board)

New point or objection—raised for the first time before the appellate Court.

Held that it was not fair to the decree holder to allow the judgment debtor to raise the point before the appellate Court. In the absence of an opportunity being afforded to the decree holder

to meet the belated objection it is impossible to speculate as to the grounds that could have been advanced by the decree holder to frustrate the objection raised by the judgment- debtor.

Prabh Dial & Others Versus Hans Raj And Others. Civil Appeal No 9 Of 1950. 9 J&K L. R. 100 (Board)

Occupancy tenancy ancestral in the hands of the husband—Widow inheriting occupancy interest in the land from her deceased husband—Proprietary rights conferred during the possession by the widow under His Highness' Command dated 8th July, 1933—Whether property self acquired qua widow.

Held that the deciding factor in such a case is not the previous possession by the husband but firstly whether the nature of the interest has changed and secondly whether the change is due to anything done by the husband or whether it is due entirely to some-thing which happened during the possession by the widow. In the present case proprietary rights were conferred by the State during the possession by the widow. In these circumstances, the property in the hands of the widow ceased to be ancestral and became their self-acquired property which she was entitled to alienate.

Further held that to get the character of self-acquisition, it is not necessary that cash consideration should be paid.

Mohd Alam & Ors V. Mst Neko & Anr) Civil 2nd appeal No. 327 of 2002—6 J&K LR Page 77 (P. C.) D. B.

Offence—Preparation—attempt and completion of offence under Egress and Internal Movement (Control) Ordinance 2005—Soction 3—What is—

Held that mere moving towards the border was by itself no offence. The offence would be said to have been committed when the border was crossed. If an accused was arrested on the border while trying to cross over, it should be called an attempt, but if the accused was moving towards the border and had yet a good deal of distance to cover, it was mere preparation and not even an attempt for simple reason that before actually reaching the border line, the accused might have changed her mind and repented of her action and come back. There could be no presumption that any body who moved towards the border wanted to cross over.

Mst Noor Bibi Versus State. Revision No 74 Of 2007. 9J&K L. R. 154 (H. C) Single Bench.

Order No. II of 1946 — — Adjournment of hearing of all suits, appeals and applications to contest transfer of land by oral agreements or un-registered deeds till last day of October 1946 — In a review application before Board of Judicial Advisers, advice was tendered by Board to His Highness before Order No. II of 1946 was issued but advice was accepted by His Highness after that order was issued — Whether review application within the mischief of Order No. II of 1946.

Held that 'hearing' of the petition is concluded when the Board pronounce their opinion and tender their advice to His Highness. For all practical purposes the controversy is put an and to by the advice of ihe Board.

Kh. Abdul Aziz Mantoo ..... Petitioner, Versus. Dr. Shivji ..... Opposite Party Misc. Application No. 1 Of 1946, 6 J&K LR Page 146 (Board of Judicial Adviscrs)

Ordinances — Issued under Constitution Act (XIV of 1996) — — — Difference between ordinances under section 5 and section 38—Ordinance under the latter section in force only for 6 months while that issued under section 5 has no time limit—inherent powers of H is Highness.

Held that for an Ordinance passed by His Highness under Section 5 of the Constitution Act, 1996, by virtue of the inherent powers reserved in him, no time limit is prescribed in the Act and such an Ordinance will continue to exist as 'ong as it is not repealed by the authority promulgating the same while an Ordinance issued under section 38 of the Act remains in force only for six months.

Ghulam Nabi Bazaz & Others Versus State, Criminal Revision No. 28 of 2006. 9 J&K LR 18 (H. C.) Single Bench.

Ordinance No. XXI of 2004 — Passed by the Offg. Head of the Administration under Command Order No. 176 — H of 1947 dated 30th October 1947 — Whether the Ordinance ultra vires of the powers conferred by His Highness on the Head of the Administration.

Held that under section 4 of the Constitution Act, His Highness can suspend the constitution or replace the existing administrative machinery by a different Agency altogether. Under section 5 of the Constitution Act, His Highness can pass any orders and ordinances on his own motion. Obviously then, the Head of the Administration has been appoint d in exercise of his inherent authority and powers saved by sections 4 and 5 of the Constitution Act. Therefore, the moment the Head of the Administration was appointed with powers to deal with emergency he must be presumed to have been invested with authority and jurisdiction which appertain to prepare incidental to the Administration of the Jammu and Kashmir State during the period of emergency. This would certainly give fullest authority to the Head of the Administration to pass orders and ordinances incidental to the administration of the State. The powers of the Administration not having been defined in the order of appointment, a general delegation of all powers—executive and legislative have to be presumed which are nec ssary for dealing with the emergency.

Further held that there is an assumption in favour of the legality of a Statute and a Statute should not be held to be unconstitutional or ultra vires unless it is clearly repugnant to the Constitution. Whatever doubts one may have entertained as regards validity of the said ordinance must be completely set at rest after the confirmation of His Highness It is an elementary principle of law that every ratification back to and is equal to a prior command.

AIR 1943 Nag. 36, 1940 All. 272 (FB), 1936 Cal. 87 followed.

Rehman Kenu V. Razak Lawai & Anr. Civil Revision No. 2 Of 2005, 7 J&K LR 170 (H. C.) Single Bench.

Ordinances — Passed under Ss. 5 and 38 of Constitution Act 1996—Distinction between the two — Ordinances passed under S. 5 does not expire after 6 months no time limit prescribed — Would continue to exist as long as it is on the Statute Book untill repealed by the authority promulgating the same ——— J&K Enemy Agents Ordinance (8 of 2005) passed under S. 5 was still in force

A time limit of six months is prescribed or an Ordinance that may be passed by His Highness under S. 38 of the (J & K). Constitution Act, 1996, on the recommendation of the Council, but as regards the laws and ordinances that are passed by His Highness by virtue of the powers reserved in him under S.5 of the Constitution Act no time has been prescribed in the Act. The result is that any such ordinance passed under S. 5 by His Highness would continue to exist as long as it is on the Statute Book, and has not been repealed by the authority promulgating the same.

Held that the Enemy Agents Ordinance.(8 of 2005) having been passed under S. 5 of the Constitution Act was still in force and would continue to be in force till it was repealed.

Gh. Nabi & Ors. V. State. Cr. Revn. No. 28 of 2006, D/- 9 Maghar 2006, AIR 1953 J&K 3 (H. C.(S. B.

Ouster — — Possession of co-owners — — Whether mere mutation constitutes ouster.

Mere Mutation on the part of a co-owner in his favour would not eonstitute sufficient ouster of the other co-owners who are presumed to be in constructive possession. There should be some overt act to the knowledge of the other co-owners to show that the co-owner in possession is holding the property exclusively for himself and denying the title of other co-owners. AIR 1922 All. 399, Reld. on

Anno. Lim Act, Arts. 142, 144, N. 35.

Ahmad Dar V. Mst. Mnkhti, 2nd Appeal No. 16 of 2007, D/- 6- 9-1959, AIR 1951 J&K 21 (H. C.) D. B.

Paramountcy lapse of — Its effect on the State of Jammu and Kashmir.

Previous to the partition there was no doubt that the Ruler of the Jammu and Kashmir State was under the suzerainty of the British Crown in as much as foreign relations were under the excusive control of the Crown representative. B-ut in sofar as the internal sovereignty of the Ruler was concerned it was absolutely unlimited and there were no fetters on it. In this connection it would be relevant to reproduce Section 4 and 5 of the Jammu and Kashmir Constitution Act, 1996. as they stood before the Act was amended in November 1951;

These provisions made it crystal clear that territories comprised in the State of Jammu and Kashmir were vested in His Highness and governed by and in his name and all rights, authority and jurisdiction appertaining or incidental to the government of these territories was exercisable by His Highness except in sofar as was otherwise directed by him. Deipite the fact that under the Act a Legislative Assembly, i. e. Praja Sabha, Legislative, Executive and Judicial powers of His Highness in relation to the State and its Government were declared to be or to have always been inherent in and possessed by His Highness. In view of these clear provisions it is futile to argue that His Highness' powers to do what he pleased in relation to the State could be seriously questioned. So far as the internal sovereignty of the State was concerned the powers of the Ruler were similar to those of the British parliament.

While the Maharaja of Kashmir was under the Paramountcy

of the British Crown before the partition of India from 15-8-1947 under section 7, Indian Independence Act (10 and 11 Geo VI Ch. 30) passed by the British Parliament Suzerainty of His Majesty over the Indian States lapsed and all functions exercisable by His Majesty at that date with respect to the State of Jammu and Kashmir, all obligotions of His Majesty towards the Jammu and Kashmir State or the ruler thereof and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in relation to the State of Jammu and Kashmir be treated or otherwise lapsed and the State became an independent and sovereign State in the full sense of the International Law. Thus whatever limits to the sovereignty of His Highness in relation to matters coming within the sphere of paramountcy existed before 15-8-1947, these ceased to exist and His Highness became an uncontrolled and absolute sovereign even in relation to such sphers from that.

Maghar Singh & Ors. V. Principal Secretary J&K Government, 1st Appeal No. 29 of 2008 and 4 of 2009, D/- 25-3-1953. AIR 1953 J&K 26 (H. C.) D. B.

Partition of estate — Claim for — Question of title — S. 139 (2) (xvii) Land Revenue Act (XII of 1996)

It is well settled that an order, in partition proceedings leaving open to the aggrieved party a right to seek his remedy in other Courts' made by a revenue officer in his capacity as a revenue officer and not in his capacity as a Court, cannot bar a civil suit on a question of title, whether such a suit is brought immediately after passing of the order or before the partition proceedings had commenced or it is brought after the partition proceedings had advanced to certain stage or even when they had been completed.

Jamadar Rajwali Khan & Ors. (Pltff. Applts) Versus Hayat Ali Khan & Ors. (Defdt. Respdts) Civil Appeal No. 14 Of 1945, 6 J&K LR page 166 (Board of Judicial Advisers).

Partition — Joint family property — — Mitakshara School Hindu Law had to be made.

Under the Mitakshara School of Hindu Iaw, the partition of the joint estate consists in defining the shares of the co-parceners in the joint property and it is not necessary that there should be an actual division of property by mets and bounds. The definition of shares may be proved inter alia by an entry in the Rights showing the shars of erch member of the family. Such an entry will be the evidence of severance of the joint status.

Nawaboo & Others V. Hari Chand, Civil 2nd. Appeal No. 207 Of 2003, 7 J&K LR 14 (H. C.) D. B.

Partnership Act (V of 1996) — Section 69, sub-section (2) — — Suit not maintainable unless firm registered — — The plaintiff's firm not registered on the date of institution of suit — Subsequent registration — Effect.

Held that the suit may be considered to have been instituted on the date when the firm was registered if it was not otherwise barred on that date.

41 C. W. N. 534 and AIR 1937 Madras 767 followed.

Ghulam Mohd & Anr V, Ghulam Mohd. & Anr. Civil Revision No. 147 of 2003 (H. C.) F. B. 7 J&K LR 120.

Penal Code (1860), Ss. 97 and 99 — Decree for possession of a plot, in favour of a member of accused's party going there to fence it but stopped by complainants — Free fight resulting and one of complainants' party killed by Gun shot — Accused held did not exceed his right of self defence.

A decree for possession was passed in favour of a member of the accused's party and possession having been already given to him, the accused,s party went to the plot to fence it. The complainant's party stopped them as a result of which free fight took place and several persons on both sides were injured. A member of the complainants' party was killed by a gun shot from the accused.

Held (1) that the accused had a right of private defence and he had not exceeded it. It would not be fair to expect of an accused under such circumstances to weigh in golden scales the amount of force to be used by him. AIR 1955 NUC (Punj) 1953, rel. on.

(2) that it could not be argued that the accused should have approached the police before taking the law into their own hand. It is not the intention of Ss. 97 and 99, Penal Code to compel a person having the right of private defence to acquiesce in the act of the opposite paty and instead of protecting his property, run to the police and leave the aggressors to do what the law entitled him to protect himself against by executing his right of private defence.
AIR 1934 All 829. rel. on.

(3) that from the fact that death had taken place in the complainants' party it eould not be said that the accused persons were the aggressors :
AIR 1954 All 35, Rel. on.

Cases Referred : AIR 1934 All 829 : 35 Cri L J 780, 1954 All 35 : 1945 Cr. LJ 54, 1936 at 622 : 38 Cr. LJ 139, ('35) 38 Pun LR 181 1955 NUC (Punj) 1353½ 55 Punj LR 343.

Jabbar Dar V. State, Cr. 1st appeal No. 9 of 2011, D/- 11- 4- 1955. AIR 1555 J&K 9 (H. C.) D. B.

Penal Code (1860), Ss. 201, 300 and 302 —

Recovery of head and clothes of deceased at instance of accused — Assused cannot be convicted under S. 302 — Accused is guilty of offence under S. 201 —
Anno. Penal Code, S. 201 N. 6 ; S. 300 N. 45.

Ali Shah V. State, Cr. 1st. appeal 16 of 2010, D/- 29- 3- 54. AIR 1954 J&K 42 (H. C.) D. B.

Penal Code (1860). S. 300 — Benefit of doubt — (Evidence Act (1872), S. 3).

No convincing motive for murder brought home to accused — Testimony of eye—witness regarding discovery of dead body shattered by evidence of investigating officer—Mystery surrounding two reports made to police, in that, one drawn up by Numberdar and Chowkidar

did not mention names of eye—witnesses and the other drawn up by husband of deceased, from which conclusion was irresistible that report was outcome of conspiracy against accused who was regarded as a village bully — — — Also it was impossible to record definite finding on question of scene of murder — Held there was room for grave doubt in truth of prosecution story — Accused held was entitled to benefit of doubt.

Anno. Penol Code, S. 300 N. 44; Enidence Act S. 3 N. 5.

Wali Dar V. State Cr. appeal No. 2 of 1952, D/- 9- 8- 1952. AIR 1953 J&K 44 (Board of Judjcial Advisers).

Penal Code (1860), S. 300 — Murder — Burden of establishing guilt — Duty of prosecution — Evidence Act (1872), S. 103.

The burden of establishing guilt of the accused is throughout on the prosecution and the prosecution must prove every link in the chain of evidence against the accused from the beginning to the end. When two persons are seen together and shortly afterwards one of them is found to have been murdered it cannot be inferred positively tnat his companion is responsible for the murder of the deceased unless there are other circumstances to support that inference. No doubt the circumstance that the deceased was last seen in the company of the accused but mere circumstances of suspicion without more conclusive evidence are not sufficient to justify conviction of the accused. Anno. I. P. C., S. 300 N. 43; Ev. Act, Ss. 101 to 103 N. 3.

Samad Malik V. State, Cr. 1st appeal No. 8 of 2009, D/- 9 Assuj 2009, AIR 1953 J&K 2 (H. C.) D. B.

Penal Code (1860), S. 302 — Evidence of murder — Motive, how far relevant.

Where in a trial for murder, there is direct evidence of a reliable character no question of motive can arise. This is, of course, subject to the consideration that the truth of the direct evidence but if making all allowances for it, the direct evidence can be trusted, the question of motive presents little difficulty.

Hence the mere fact that the motive alleged by the prosecution is inadequate is not in itself a ground for not convicting the accused. Anno. Penal Code, S. 300 N. 42.

Satar Mir V. State. Cr. Appeal No. 3 of 1951, D/- 11- 6- 51. AIR 1952 J&K 22 (Board of Jud. Advisers)

Penal Code (1860), S. 302 — Motive

Motive however strong is nothing more than a link in a chain of circumstances establishing the guilt of a person. At the same time mere non-establishment of motive would not be a sufficient ground to order the acquittal af an accused.
Ann. Penal Code, S. 302 N. 14.

Ali Shah V. State. Cr. 1st Appeal No. 16 of 2010, D/- 29- 3- 1954. AIR 1954 J&K 42 (H. C.) D. B.

Penal Code (1860), S. 302 — Sentence — Discretion — How to use — (Criminal P. C. (1898). S. 367 (5))

The sentence under S. 302, Penal Code is no doubt in his

discretion of the Sessions Judge, but he has to exercise that discretion in accordance with the well known judicial principles and not quite arbitrarily in violent disregard of those principles.

Anno. Penal Code, S. 302 N. 2, Pt. 6, Cr. P. C. S. 367, N. 14

Atta Mohd V. State, Cr. 1st Appeal No. 55 of 2006, D/- 15 Katik 2007, AIR 1952 J&K 36 (H. C.) D. B.

Penal Code (1860). Ss. 304 and 326 — Common intention

Common intention means the intention to commit the crime actually committed. It may not be a pre-conceived plan and might come into existence even at the time when the fight ensued.

Four persons went at late hour in the night to the place where the deceased resided. One of them carried a thick stick which could have caused grevious hurt is used more than once. Manner and circumstances in which they were going showed that every one of them was aware that a fight may be necessary consequence of their going in which a hurt of some kind may be the result. Quarrel with deceased developing into hand fight in which beating was administered to deceased. Deceased receiving fatal injury but who gave that injury not known. Accused must be presumed to have a common intention to cause grievous hurt in the circumstance. Accused held guilty under S. 325 and not under S. 304(ii), Penal Code.

Mehtab Singh V. State, Appeal No. 25 of 2007, D/- 18 P0h 2007. AIR 1954 J&K 17 (H. C.) S. B.

Penal Code (1860), Ss. 363 and 376 — Offence under

Charges under Ss. 363 and 376 — Sessions Judge finding that girl was not an unwilling agent in going away with accused — Also that sexual intercourse was not against her will — Age of girl found more than 14 years but less than 16 years when rape was committed — Offence held did not come under S. 376 — Offence under S. 366, however, held proved.

Anno. Penal Code, S. 363 N. 1; S. 376 N. 1.

Illamdin V. State, Cr. first appeal No. 5 of 2009, D/- 18- 2- 1953. AIR 1953 J&K 21 (H. C.) D. B.

Penal Code (1860), S. 420 — Ingredients of offence — False representation to accused's knowledge at time of making it must be proved.

The main ingredients of an offence of cheating are that there should be deception of a person so as to fraudulently or dishonestly induce that person to deliver any property to any person or to consent that any person shall retain any property or intentionally induce that person to do or omit to do anything which he would not do or act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. From this it follows that a wilful misrepresentation of a definite fact who intent to defraud would be cheating. Along with this, it has to be shown that the representation made was false to the accused's knowledge at the time when it was made. An act would not come within the definition of cheating if the representation has turned out to be untrue at a future date.

Where the accused made a representation to the complainant that he would supply labour and in pursuance thereof he got two

sums of money at different times as an advance but ultimately failed to act according to the representation and the complainant did not allege anything more than this, the act would not come within the definition of cheating.

Anno, Penal Code, S. 420 N. 3, 4, 6 and 11.

Amir Chand V. Lok Nath, Cr. Misc. Appln. No. 99 of 2009, D/- 10- 1- 1952. AIR 1952 J&K 26 (H. C.) S. B.

Penal Code (1860), Ss. 420 — Intention — Proof of — Breach of Contract

Where a complaint of an offence of cheating is made on the ground that the accused has entered into a contract with the complainant to work for the latter and that he had not commenced work in spite of complainant making two payments as agreed, the complainant has to establish a preconceived intention on the part of the accused of not carrying out the terms of the agreement. Such an intention cannot be presumed from the mere receipt of money and not working subsequently according to the terms of the agreement. Mere receipt of money would not be cheating unless it is shown that it was received with the preconceived intention of denying it later on. If the intention is changed subsequently it would not be cheatsng. 159 Ind Cas 167 (1) (Pat) and AIR 1923 Lah 621, Relon.

The whole transaction may amount to a breach of contract, might involve a breach of faith, a betrayal of confidence, and might arouse moral indignation. P-ut that would not convert it into a criminal offence. AIR 1938 Mad 129 Relon.

Anno. 17 P. C., S. 420 N. 4, 11.

Devia Ram anr. V. L. Ram Chand, Appln. No. 105 of 2009, D/- 25- 2- 1953. AIR 1953 J&K 22 (H. C.) S. B.

Penal Code (1860), S. 498 — Ranbir Penal Code, S. 498 — — Married woman eloping with lover and staying with him of her own free will — Both of them are guilty under S. 498.

In the State of Kashmir an elopement which was the result of joint adventure by a married woman with a lover would, in view of the addition to S. 498, R. P. C., that in such cases the woman would be guilty as an abettor. certainly come within the mischief of S. 498. R. P. C. If a married woman whose husband is living were to elope with another person. both of them will be guilty under S. 498. R. P. C. the fact tnat the woman with her own free will has chosen to stay with the accused and that she is a free agent to leave him any moment she likes, would make not the slightest difference, since the wife is also liable to be dealt with as an abetter. Case law ref.

Anno. AIR Man., Penal Code, S. 498, N. 1.

Cases referred :

AIR 1937 Bom 186 : 38 Cri LJ 769
1949 All 23 : 50 Cri LJ 82
1936 Cal 450 : 38 Cri LJ 180
1939 Lah 295 : 40 Cri LJ J60
1933 Bom 489 : 35 Cri LJ 376
1837 Lah 617 : 38 Cri LJ 576
26 Mad 463 : I Weir 574.

Kesar & anr. The State, Cr. Revn. No. 69 of 2011, D/- 25- 2- 1955. AIR 1955 J&K 18 (H. C.) S. B.

Persona designata — Circular No. 136 — Order passed by the Munsiff in pursuance of Circular — No. jurisdiction conferred on an individual judge as persona designata — -- Order therefore revisable.

Held that reference to the circular would show that the jurisdiction in the matter has been given to the judicial courts and not to an individual judge as persona designata and as such any order passed by a court under No. 136 is clearly revisable by this Court.

S. Seva Singh V. Ghulam Mohd. Civil Revision No. 6 of 2006, 8 J&K LR 198 (H. C.) Single Bench.

Personal Law — — Applicability of — — presumption regarding succession, inheritance, marriage, guardianship etc — Evidence required to establish custom to the contrary —

In the absence of proof to the contrary, the presumption is that a person is governed by his or her personal law in matters relating to succession, inheritance, guardianship etc. The very best possible evidence and that of a high order is needed to establish the existence of a custom in derogation of the personal law of the parties to a litigation. The more abnormal is the custom pleaded, the heavier is the burden on the party alleging the same and it is not permissible to infer the existence of such a custom simply on the basis of the existence of some other analogous custom which is not in conformity with the personal law of the parties.

Ramzan V. Mst. Khatji, Appeal No. 4 of 1950, D/- 21- 6- 1950, AIR 1951 J&K 12 (Board of Judicial Advisers).

Pleadings — Gift denied in a general way — — No specific plea regarding attestation of deed — At the trial execution proved but no evidence regarding attestation — Whether rejection of the deed on this ground justified.

Party held was not bound to call evidence in regard to attestation and rejection of the deed on this ground held not justified. Anno. C P C, O. S, R. 3, N. 1.

Sh. Raghunath Devi V. Kh. Samad Gashru, Civil Appeal No. 2 of 1950, D/- 16- 6- 1951. AIR 1952 J&K 30 (Board of Judicial Advisers).

Pleadings — Indifference on the part of subordinate Courts.

The Board of Judicial Advisers have repeatedly commented on the indifference on the part of the sub—ordinate Courts in the matter of pleadings. If care is taken in the initial stages of a case to scrutinize the pleadings and to examine the parties before issues are framed to elucidate obscurities in the plaint and the written statements considerable waste of time and expense would be avoided and the decisions would be more satisfactory.

Mst. Zooni & Ors. V. Salam Ors. Civil appeal No. 8 of 1948, 8 J&K LR 37 (Board of Judicial Advisers).

Pleadings — Pleading of a custom — Requirements.

A custom should be proved to be ancient, uniform and continuous.

It has been pointed out so many times that the pleading of a custom may not be presumed in every case and that it has to be definitely set forth and pleaded. In cases where certain customs are very well-known and found to be generally in vogue this rule of pleading may be relaxed. In the District of Kathua the custom of a resident daughter inheriting her father's property in the same manner as a son is not at all in vogue and is never known to have been followed. The term "Dukhter Khana Nashin" should, therefore, be interpreted in its natural meaning and not in the sense it has been acquired in Kashmir Valley in view of the custom prevailing there.

Mst. Jevani V. Ramanand, Civil 2nd Arpeal No. 22 of 2003, 7 J&K LR 10, (H. C.) Single Bench

Possession — Nature of — — Admissiblity of revenue records and mutation proceedings.

Held that it is open to a party to prescribe for a full or a limited title, Law cannot give him a full title, In view of the respondent's assertion in proceedings before the revenue authorities and having regard to the proceedings of the revenue authorities and the entries in the revenue records, the possession of the respondent for more than 12 pears after that assertion can confer on him a prescriptive right as a mortgagee and not as a full proprietor.

Held further that mutation register is a public document and its certified copy is clearly admissible in evidence under section 74 read with section 35 of the Evidence Act, 1977. The signed statement contained in the mutation order is admissible as an admission under section 21 of the Evidence Act, 1977, and the certified copy being more than 30 years old can also be presumed to be genuine under section 90 of the said Act.

Shiv Ram & Ors. V. Ramoon Shah & Os. (Pltff. Resdt). Civil Appeal No. 11 Of 1947, 6 J&K LR page 119 (Board)

Power of superintendence — Exercise of by the High Court — Only in those cases where a party is likely to suffer irreparable damage in case the order of the Court is allowed to stand.

Under S, 64 of the J&K Constitution Act read with S. 22 of the Letters Patent, the High Court has power ot superintendence over Courts over which it has revisional or appellate jurisdiction. As S. 21 of the Houses and Shops but Control Act. 2009. Sub-s. (5) empowers the High Court to hear revisions from an order the District Judge passed in appeal against the order of the Controller it can exercise superintendence over the Court of the Controller as well.

The power of superintendence should be exercised very sparingly and only in those cases where a party is likely to suffer irreparable damage in case an order of the Court is allowed to stand. When there is another remedy open to a party the power of superintendence of the High Court cannot ordinarily be invoked and therefore when a final order passed by the Rent Controller in a case will be appealable and the aggrieved party would then have a right to get any error rectified the High Court will not interfere with an interlocutory order passed by this authority.

Bodhraj V. Gurchrandas, Civil Revn. No. 103 of 2010 D/- 10- 2- 54. AIR 1955 J&K 29 (H. C.) D. B.

Practice — Witness — Credibility.

It is not sound ground for believing or disbelieving a witness that he is of the same caste or community as the person in whose fauour he deposes. If evidence is to be judged by caste affiliations it is not difficult to conceive that Courts will be misled into very erroneous findings.

Raghunath Dass & Anr. V. Th. Rachpal Singh, Civil Revisions Nos. 110 and 113 Of 2003, 7 J&K LR 20 (H. C.) Single Bench.

Precedents — Ruling not taking into consideration certain provision of Law — Binding nature.

Where a certain point of law is not brought to the notice of the Court in determining the cause, the decision is not a precedent calling for the same decision in a similar case in which the point is brought before the Court

Hence where the ruling of the Board of Judicial Advisers (Kashmir) has not taken into consideration a certain provision of law, the ruling is not binding on the High Court of Jammu and Kashmir.

Gh. Rasul V. State, Misc. Appln. No. 23 of 1955, D/- 27- 9- 1955, AIR 1956 J&K 17 (H. C.) F. B.

Pre-emption — Extinguishment of the right by waiver — — What amounts to.

Held that when it is sought to extinguish a right of pre-emption by waiver it must by shown that there was some positive act amounting to relinquishment of the pre-emption right so as to operate as a forfeiture. Mere silence does not amount to waiver. A man may be present at the time of sale and not announce his intention of bringing a suit to pre-empt but that does not debar him because he has a whole year in which to make up his mind nor is the question of want of funds relevant to the right to pre-empt.

Mst. Mali V. Ghulam Haider and Anr. Civil first Appeal of 2003 7 J&K LR 104 (H. C.) D. B.

Pre-emption suit — Limitation.

The law of limitation in this State, in relation to suit for pre-emption, is contained in Article 10 of the first schedule of the Limitation Act and section 29 of the Right of Prior Purchase Act. Under Article 10 one years' period provided for such suit commences when the vendee takes physical possession of the whole of the property sold or where the subject of the sale does not admit of physical possession when the registration of the instrument of sale is completed. Section 29 of the Right of prior Purchase Act which supplements Article 10 of the Limitation Act provides two starting points in the case of sale of agricultural land, —

(1) the date of attestation if any of the sale by a revenue officer having jurisdiction in the registration of mutations maintained under the Land Revenue Act, or (2) the date on which the vendee takes under the sale physical possession of any part of such land or property whichever date shall be earlier. The words "sale" occurring in section 20 must, in view of section 138 Transfer of Property Act, be taken to mean a valid and operative sale. Any other interpretation

of that term will militate against the spirit, if not also the language, of the Statute Lrw in force in the State.

To make section 29 applicable it is not necessary that the physical act of taking possession should take place afresh where a vendee has already taken possession in anticipation of a registered instrument. In such a case the mental act of holding the property under a title perfected by registration is tantamount to taking physical possession under the registered deed.

Jamal Din V. Gopalsingh & Ors. Civil Appaal No. 15 of 1947, 6 J&K LR page 113, (Board of Judicial Advisers).

Presumption — Conclusive — Birth duriug the continuance of a valid marriage — Proof of valid marriage essential.

Held that section 112 of the Evidence Act adopts the date of birth and not the date of conception as the basis of legitimacy and provides that birth during the continuance of a valid marriage is conclusive. But before such a conclusive presumption can be drawn it must be shown that there was a valid marriage subsisting between the parties at the time of the birth.

Atta Mohd V. Fida Mohammad, Civil IInd Appeal No. 1 Of 2003 in Forma Pauperis, 7 J&K LR 99. (H. C.) D. B.

Presumption — Copy of a document thirty years old — Copy itself thirty years old — Presumption as to the genuineness of the original.

The execution and contents of a lost ancient document cannot be proved merely by the production of a copy which itself is 30 years old but that this copy considered with the other evidence may give rise to a presumption as to the genuineness of the original.

Dharm Sala Suthra Shahiyan, V. Mahant Harnam Dass and Ors., Civil IInd Appeal No. 72 of 2003, 7 J&K LR 145 (H. C.) D. B.

Presumption — Evidence Act (1872) — S. 114 — Presumption as to maintenance of a widow under Hindu Law — Death of father— in — Law — mutation of property in the name of the widow of pre—deceased son along with two other sons—Possession of widow for—more than twelve years.

On the death of A the lands left by him were mutated in the name of his two sons B and C and the widow of a third son who had died during the lifetime of A. Along with B and C, the widow also entered into possession of the land that was mutated in her name and retained it all along in her exclusive possession. Later on, the widow executed a will by which she bequeathed the property mutated in her name to B. After her death C brought the present suit on the ground that the widow being a Hindu widow could not alienate the property mutated in her name; he prayed a decree for 1/2 of the property mutated in widow's name.

Held (1) that accordirg to Hindu law the wife of a predeceased son is not an heir of her father-in-law. All that she could claim in the family estate was maintenance. 1927 Oudh 138 rel. on.

(2) that according to Hindu law there was no presumption that 1/3rd share allotted to the widow on the death of her father-in-law was in lieu of her maintenance ; 1949 All 458 rel. on.

(3) that there was no evidence to establish that the mutation was effected in the name of the widow as a mere consolation

or in lieu of maintenance as a result of an arrangement arrived at between the heirs of A and as such her possession started from the very beginning adversely to other heirs of A. 1955 All 630 and 1940 Oudh 269 Ref.

(4) that the widow having remained in adverse possession for more than twelve years, her possession matured actually into ownership and that she had power to alienate it by will without let or hinderance from any quarter.

Anno: AIR Com. Lim. Act, Arts. 142 and 144 N. 22, 23; AIR Man. Evi. Act, S. 114 N. 20

Cases Referred:

1927 Oudh 138: 99 Ind Cas 890, 1949 All 458, 1955 All 630, 1940 Oudh 269: 187 Ind Cas 179.

Bhagwan Dass V. Krishenlal & ors AIR 1956 J&K 37 (H. C.)D. B. 2nd appeal no. 169 of 2911 D/-9-2-56.

Presumption—Joint family property—Hindu Law—

Held that while a father and his sons in a Hindu family may be presumed to be joint there is no presumption that any particular property standing in the name of one of the members is joint family property unless it is established thar there was a nucleus of joint family property around which subsequent acquisitions could gather.

AIR 1935 All. 303; 1926 Bom 408, 1930 Lah. 613, I. L. R. 25 Madras 149, AIR 1941 Lah. 447, 1942 Oudh 155: dissented from.

Amar Nath Tiku & Ors V. SH. Sonamali & Anr. Civil Appeal No. 4 Of 1948; 8 J&K LR 92 (Board of Judicial Advisers)

Presumption——regarding a custom prevailing in one part of the country also prevailing in another part also—no presumption.

A custom should be proved to be ancient, uniform and continuous. It has been pointed out so many times that the pleading of a custom may not be presumed in every case and that it has to be definitely set forth and pleaded. In cases where a certain customs are very well-known and found to be generally in vogue this rule of pleading may be relaxed. In the District of Kathua the custom of a resident daughter inheriting her father's property in the same manner as a son is not at all in vogue and is never known to have been followed. The term "Dukhtar Khana Nashin" should, therefore, be interpreted in its natural meaning and not in the sense it has been acquired in Kashmir Valley in view of the custom prevriling there.

Mst. Jani V. Ramanand Civil 2ND Appeal No. 22 of 2003, 7 J&K LR 10 (H. C.) Single Bench

Presumption—Whether joint Hindu family possessed of ancestral property.

It is well known rule of law that though there is a presumption that every Hindu family is normally joint, there is no presumption that such family is possessed of ancestral or joint family property or that any particular property is of that nature.

PT. Janki Nath Applt. V. Sati Mali & Ors Civil Appeal No. 24

Of 1947, 6 J&K LR Page 138 (Board)

Prevenive Detention—Grounds based on alleged illicit smuggling of three categories of essential goods to Pakistan—Two categories found not to be essential goods—Whether order of detention bad Jammu and Kashmir Preventive Detention Act, 2011, ss. 3(2) and 12(1).

The petitioner was detained by virtue of an order of detention passed by the District Magistrate, Jammu, under S. 3(2) of the Jammu and Kashmir Preventive Detention Aot, 2011 and that order was confirmed and continued by an order passed by the Government of the State of Jammu and Kashmir under s. 12 (1) of the Act after taking the opinion of the Advisory Poard. The order recited that it was necessary to detain the petitioner with a view to paeventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to the community and was based on the ground of alleged illicit smuglling by the petitioner of esssential goods such as shaffon cloth, zari and mercury to Pakistan. It was found that shaffon cloth and zari were not essential goods. It was not established that the smuggling attributed to the petitioner was substantially only of mercury or that the smuggling as regards shaffon cloth and zari was of an inconsequential nature.

Held, that the order was bad and must be quashed. The subjective satisfaction of the detaining authority must be properly based on all the reasons on which it purports to be based. If some out of those reasons are found to be non-existent or irrelevant, the Court cannot predicate what the subjective satisfaction of the authority would have been on the exclusion of those reasons. To uphold the order on the remaining reasons would be to substitute the objective standards of the Court for the subjective satisfaction of the authority. The Court must,however, be satisfied that the vague or irrelevent grounds are such as, if excluded, might reasonably have effected the subjective satisfaction of the authority.

Kashaw Talpade V. The King Emperor((1943) F. C. H. 88), Atma Ram Sridhar Vaidya's case ((1951) S. C. R. 167), Dr Ram Krishan Bhardwaj V. The State of Delhi ((1953) SCR. 708) and Shiban Lal Saksena V. The State of U. P. ((1954) S. C. R. 418), relied on.

Dwarka Dass Bhatia Versus The State Of J&K, S. C. R. 1956 Page 948
Petition No. 172 of 1956 D/-1-11-56

Preventive Detention Act, 2011—S. 3(2)—S. 12(1). Preventive Detention— Grounds based on alleged illicit smuggling of three categories of essential goods to Pakistan— Two categories found not to be essential goods —Detention order reciting—necessary to detain the Petitioner with a view to preventing him from acting in a manner prejudicial to the maintenance of supplies essential to the community— alleged smuggling of Shaffon cloth, zari and mercury to Pakistan—Detention order held bad— If some out of those reasons on which the subjective satisfaction was based are found to be non existent or irrelevant the Court cannot predicate what the subjective satisfaction of the authority would have been on the exclusion of those reasons—Court cannot substitute its own objective standards for the subjective satisfaction of the detaining authority.

The petitioner was detained by virtue of an order of detention

passed by the District Magistrate, Jammu. under S. 3 (2) of the Jammu and Kashmir Preventive Detention Act, 2011 and that order was confirmed and continued by an order passed by the Government of the State of Jammu and Kashmir under s. 12 (1) of the Act after taking the opinion of Advisory Board. The order recited that it was necessary to detain the petitioner with a view to preventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to the community and was based on the ground of alleged illicit smuglling by the petitioner of essential goods such as shaffon cloth, zari and mercury to Pakistan. It was not established that the smuggling attributed to the petitioner was substantially only of mercury or that the smuggling as regards shaffon cloth and zari was of an inconsequential nature.

Held, that the order was bad and must be quashed. The subjective satisfaction of the detaining authority must be properly based on all the reasons on which it purports to be based. If some out of those reasons are found to be non-existent or irrelevant, the Court cannot predicate what the subjective satisfaction of the authority would be to substitute the objective standards of the Court for the subjective satisfaction of the authority. The Court must, however. be satisfied that the vague or irrelevant grounds are such as, if excluded, might resonably have affected the subjective satisfaction of the authority.

Kashaw Talpade v. The King Emperor (1943) F.C.R. (88), Atma Ram Sridhar Vaidva's case ((1951) S. C. R. 167), Dr. Ram Krishan Bhardwaj v. The State of Delhi ((1953) SCR. 708) and Shiban Lal Saksena v. The State of U.P. ((1954) S.C.R. 418), relied on.

Dwarka Nath Dass Bhatia Versus The State Of J&K, S. C. R. 1956 Page 948, Petition No. 172 of 1956, D/- 1- 11- 56.

Preventive Detention Act (4 of 2011) — S. 8 — Detention for reasons of security of State—Declaration as to non—supply of grounds—Time Limit.

Though it is highly undesirable that a detenue with regard to the supply or non-supply of the ground is delayed, yet a reference to proviso to S. 8, Preventive Detention Act, would show that no time-limit for making a declaration with regard to the non-supply of grounds is provided by this Section or any other section of the Preventive Detention Act. Such being the case. the Government cannot be forced to act in a manner which may be more desirable, but which the law does not make upon it obligatory. Hence where the detention is for reasons of security of State, the mere fact that the declaration as regards non-supply of grounds is made after the application for habeas Corpus is submitted to the High Court does not vitiate the detention.

Hissam-ud-Din &. ors v/s State Cr. Matters, Habeas Corpus Applns. Nos. 173 to 176 of 2011 D/-18-1-1955, AIR 1955 J&K 7 (H. C.)F. B.

Prior Purchase Act (II of 1993) —Plaintiff having right of prior purchase associating with himself strangers—Plaintiff's right defeated.

Held that the principle is that a person who has no right of pre-emption is likewise a stranger and cannot be associated in a suit by one who has a right of pre-emption.
3 J&K LR 81 (F. B.) distinguished.

Ramzan Malick V. Gani Band Civil IInd. Äppeal No. 306 of 2003 7 J&K LR 162 (H. C.).D. B.

Privilege—Whether opinion given by Legal Adviser privileged —under section 126 Evidence Act (1872)

Opinion given by the Law Secretary who functions as a Legal Remembrancer to the State, regarding the plaintiff's clain against the State and which are in the nature of an advise given by the legal adviser to his client are privileged.

Anno. Evi. Act: S. 126 NAI, 2.

L. Tirath Ram V. His Highness Govt. J&K, Original Suit No. 2 of 2007 D/-29 Bhadon 2007, AIR 1954 J&K 11 (H. C.)S. B.

Procedure— Suit for rendition of accounts of a dissolved partnership —Plea of defence that accounts finally settled between the parties — Preliminary issues as to the maintainability of a suit for accounts struck—Plaintiff not afforded an opportunity to prove his case that no accounts were settled—Suit dismissed on the ground that accounts were finally settled and suit for accounts not maintainable.

Held that the findings that accounts have already been settled and no case for re-opening of accounts has been made out, cannot be arrived at without framing proper issue and without giving an opportunity to parties to produce all their evidence. There has not been a fair and proper trial of the controversy between the parties.

The case was remanded by the Board.

Kundan Lal V. L. Lachman Dass & Ors Civil Appeal No. 8 Of 1947, 7 J&K LR 230 (Board of Judicial Advisers).

Production of documents — Late production not justified but no objection raised at the time of the production in evidence in the trial court or in other courts below — Grievance not entertainable before the Board.

It is not clear by what procedure the late production of the documents was justified but it is clear that the respondent raised no objection to their reception in evidence in the trial Court or in other Courts below. And it is not possible at that late stage to entertain the grievance about the production of the documents.

Shiv Ram & Ors. (Plaintiff - Appellants). Versus Ramoon Shah & Ors. (Defendant - Respondent) Civil Appeal No. 11 of 1947, 6 J&K LR page 119 (Board)

Promissory Note — — Unstamped — A stamped receipt attached to the pronote — Suit on the basis of promissory note — Whether amount recoverable.

The plaintiff has to establish an undertaking by the defendant to repay the sum of money received by him and when such undertaking is contained only in a promissoy note which is inadmissible in evidence no suit can be brought on the basis of the receipt as the receipt does not contain any promise to pay.

Mst. Rehmaon V. Jagir Din, Civil Revision (ARA) No. 115 Of 2003, 7 J&K LR 44 (H. C.) Single Bench.

Proof — Charge of murder — Straight forward account by prosecution witnesses in the F. I. R. — No evidence adduced in defence — Con-

currant findings of fact by the trial court and the High Court regarding guilt of the accused — — One of the P. W's seemed won over— Extenuating circumstances mentioned in his statement in the court of Sessions — — Statement of this witness in the committing court tendered as evidence under Section 288 Cr. P. C.

Held on careful consideration of the entire evidence in the case and of the arguments advanced by the learned advocate for the accused—appellant. The Board saw no reason to differ from the conclusions arrived at by both the Courts below and that the Board were satisfied that the appellant had been rightly convicted for the offence of murder.

Gian Chand Versus State, Criminal Appeal No. 1 Of 1950, 9 J&K LR 157 (Board).

Proof — Execution of document less than 30 years old — What is sufficient proof.

Held that this is no proof of the execution of the document. In the case of documents required by law to be attested there is an additional duty cast of proving the execlution by producing at least one attesting witness and it is only this additional obligation that is obviated by the proviso to section 68 in the case of registered documents. It does not mean that the execution of the document need not be proved at all. Identification of the signatures of the scribe or marginal witness is not proof of the execution of documents. This requires some evidence to identify the signatures of the executants themselves.

Bhagat Singh V. Rasil Singh & Ors. Civil IInd Appeal No. 14 Of 2003, 7 J&K LR 33 (H. C.) D. B.

Provincial Small Cause Courts Act (1887), Art. 8—Rent—Meaning of.

The word 'rent' is used in respect of immovable property like land, house and shops. The word 'rent' therefore, has distinct meaning from the word 'hire' and unless suits for hire are specifically excluded from the cognizance of Court of Small Causes it cannot be held that the suit for hire would not lie in the Court of the Small Causes. Thus the suit for recovery of hire for boats is not excepted under Article 8: 7 Ind. Cas 553 (Cal), Rel. on. Anno. Pro. S. C. Act Art. 8 N. 2.

Radha Kishen V. Sona Khandi, Civil Rev. No. 46 of 2007, D/- 26 Jeth 2008, AIR 1952 J&K 15 (H. C) C. J.

Provincial Small Cause Courts Act (1887), S. 25 — Interference on question of fact.

Normally the finding of fact recorded by the trial Court is not interfered with in revision but when the trial Court has brushed aside the documentary and oral evidence without giving any good reason for doing so and has returned a finding contrary to the evidence on record, the finding arrived at by the trial Court can be overset in revision.

Anno. Prov. Small Cause Courts Act, S. 25 N. 11

Hari Chand V. Karam Chand. Civil Ren. No. 62 of 2008 D/- 24. I. 1952 AIR 1952 J&K 27 (H. C.) C. J.

Public Gambling Act (1867) S. 5—Search warrant —Defects in Wrong procedure —Effect

Where the warrant was issued in the name of an officer who was not correctly designated in it, and the said officer did not follow the direction given in the warrant and also exceeded the authority that was given to him and the house which was searched was not the one mentioned in the warrant :

Held that the conviction of the accused could not be sustained :

AIR 1937 Cal 54 and 1936 All 109 Rel. on.

Anno. Pub Gam Act, S. 5 N. 2.

Ahmed Bhat & Ors V. State Cr Rev. No. 38 of 2308 D/-29 Assuj 2008. AIR 1952 J&K 14 (H. C.) S. B.

Public Prosecutor — intervening in a private complaint and withdrawing the prosecution without consulting the complainant —He can do so—

A Public Prosecutor can intervene in a Criminal case instituted on a private complaint. The Public Prosecutor who has taken charge of the case instituted on a private complaint can withdraw the prosecution without consulting the complainant.

AIR 1924 All 203. distinguished.

Partap Chand V. L. Behari Lal & Ors. Cr. Misc. No. 259 of 2010 D/- 11- 2- 1955. AIR 1955 J&K 12 (H. C.) D. B.

Public Safety — Jammu and Kashmir Preventive Detention Act (2011), S. 4 — Detention of detenu —— Procedure laid in S. 4 not strictly observed — Detention is invalid.

Per Kilam and Shahmiri JJ. (Wazir C. J. contra) : Where the detention orders are not served on the detenus in accordance with the procedure established by S. 4, Jammu and Kashmir Preventive Detention Act, 2011, the arrest and detention of the detenus are both improper and invalid. The procedure laid down by law has to be strictly observed and where deviation from legal procedure is entitled to be set free. AIR 1952 SC 106 and AIR 1954 J&K 59 : Disting : 1955 J&K 7 (FB), Rel. on.

M. Subhan & Ors. V. State, Cr. Misc. Applns. Nos. 38 to 40, 42, 44, 48, & 51 of 1955, D/- 2- 8- 1955, AIR 1955 J&K 1 (H. C.)F.B.

Public Safety — Jammu and Kashmir Preventive Detention Act (4 of 2011), S. 8 — Detention for reasons of security of State — Declaration as to non-supply of grounds — Time limit.

Though it is highly undesirable that a detenue should remain in suspense, if the making of a declaration with regard to the supply or non-supply of the ground is delayed, yet a reference to proviso to S. 8, Preventive Detention Act, would show that no time limit for making a declaration with regard to the non-supply of grounds is provided by this Section or any other section of the Preventive Detention Act. Such being the case, the Government cannot be forced to act in a manner which may be more desirable, but which the law does not make upon it obligatory. Hence where the detention is for reasons of security of State, the mere fact that the declaration as regards non-supply of grounds is made after the application for habeas Corpus is submitted to the High Court does not vitiate the detention.

Hissam-ud-Din & Ors. V. State, Cr. Misc. Matters, Habeas Corpus Applns. Nos. 173 to 176 of 2011, D/- 18- 1- 1955, AIR 1955 J&K 7 (H. C.) F. B.

Public Safety — Jammu and Kashmir Public Security Act (15 of 2003 Sm.) 3 — Annexure to Council Order No. 356 C of 1947 — Detention outside jurisdiction — (Criminal P. C. (1898). S. 491) — (Constitution of India, Art. 226).

An order of detention directing that the detenu be detained at a place beyond the jurisdiction of the detaining authority is illegal as the annexure to Council Order No. 356C of 1947 shows that the power of arrest and detention has to be exercised by a police officer within his own jurisdiction. AIR 1949 Bom 37, Rel. on.

Anno : Cr. P. C ; S. 491 N. 7.

Ghulam Nabi Jan V. State, Misc. Cr. Case No. 109 of 2010, D/- 28- 7- 1953. AIR 1954 J&K 7 (H. C.) D. B.

Public Safety — Jammu and Kashmir Public Security Act, S. 3 — Detention under — Grounds for need not be supplied to detenue — Preventive Detention Act (195)). S. 7 — Applicability.

For purposes other than defence, foreign affairs and security of India, the Public Security Act is in force so far as the State of Jammu and Kashmir is concerned and detention can be ordered under its provisions.

Consequently, an order passed under S. 3 of the Public Security Act cannot be said to be invalid merely because the detenue is not supplied with the grounds of detention. The provisions of S. 7 Preventive Detention Act cannot apply to such a case and the provisions of Public Security do not provide for supplying such grounds to the detenue.

Jagat Ram Aryan V. State, Cr. Misc. Appln. No. 32 of 2008, Decided on 27- 7- 1951. AIR 1952 J&K 4 (H. C.)

Public Safaty —— Jammu and Kashmir Public Security Act, S. 3 —

Order of detention under, passed and signed by a sub - divisional Magistrate at a time when that sub-division had been converted into a district and when he had ceased to exist as sub-divisional Magistrate—Order is invalid — Cr. P. C. (1898) S. 491 —

Jagat Ram Aryan V. State, Cr. Misc. Appln. No. 32 of 2008, D/- 27- 7- 51. AIR 1952 J&K 4 (H. C.) S. B.

Public Safety — J. and K. Public Security Act (15 of 2003). S. 3 — Order under — Form of.

It is true that no form is prescbibed in S. 3 in which an order of detention is to be drawn but that does not mean that a free licence has been given to detaining authorities to draw their orders in a haphazard manner. The order must not only show that the necessity of making a detention order, but it must also show, and the detenue has a right to know, that the detaining authority was in fact authorized by the Government to take action under the relevant section.

G. A. Ashai V. State, Cr. Misc. Appln. No. of 2010, D/- 22- 7- 1954. AIR 1954 J&K 59 (H. C.) Full Bench.

Public Safety — J. and K. Public Security Act (15 of 2003), S. 3 — Order under, should be signed by proper authority.

The order under S. 3 is not an executive order, but is an order under a Statute. When a statutory duty is cast upon an authority to do a certain act, it is that authority which must do that act and sign all orders passed the said statute. Without express powers granted by the state to itself, the said authority cannot delegate its powers to any authority whatsoever.

Held that the signing of the order by Deputy Secretary in place of the Minister was improper.

G. A. Ashai V. State, Cr. Misc. Applu. No. 4 of 2010, D/- 22-7- 1954. AIR 1954 J&K 59 (H. C.) F. B.

Public Safety — J. and K. Public Security Act (15 of 2003) (as amended by Act 13 of 2010), S. 3 — Power of Government to revoke defective order and pass fresh order — (Criminal P. C. (1898), S. 491).

The Government has the right to pass a fresh order of detention, if it cones to the conclusion that the previous order of detention was defective on any grounds whatsoever and once such a valid order of detion is passed, any irregularities or illegalities of the period prior to the making of the fresh valid order would in no way affect the merits or the result of the case.

Further, if at any time before the Court directs the release of the detenu,a valid order directing his detention is produced, the Court can not direct his release merely on the ground that at some prior stage there was no valid order for detention. AIR 1945 FC 18 and 1952—SC 106, Rel. on. Anno. Cr. P. C, S. 491 N. 7.

G. A. Ahai Versus State, Cr. Misc. Appln. No. 4 of 2010, D/- 22-7- 1954. AIR 1954 J&K 59 (H. C.) F. B.

Public Safety — (Jammu and Kashmir) Public Security Act S. 3 — Power of High Court — Criminal P. C. (1898) S. 491.

Under S. 3 of the Public Security Act the sufficiency or insufficiency of material which might have satisfied the detaining authority effecting the detention of a person is a matter for the decision of that authority alone which passed the order of detention. The High Court has, however, power to examine the correctness of the recital about satisfaction of the detaining authority contained in any such order and if it comes to the conclusion that the recital is incorrect, it may declare the order to be invalid and the detention of the individual concerned to be illegal.

Anno. Cr. P. C. S. 491 N. 7.

Jagat Ram Aryan V. State, Cr. Misc. Appln, No. 32 of 2008, D/- 27-7-1951, AIR 1952 J&K 4 (H. C.) S. B.

Public Safety — Jammu & Kashmir Public Security Act, S. 3 — — Prior order of externment — Subsequent immediate order of detention — Validity — Criminal P. C. (1898) S. 491.

A wavering mind can never be treated as "a mind satisfied" which is pre-requisite for passing an order under S. 3 of the Public Security Act.

Where on the oral report of a police an order for externment

was passed against the detenue but the magistrate shortly after passed an order of detention against the detenue :

Held that the order of detention was not valid in as much as the prior order of externment showed that the magistrate was not satisfied as to the necessity of the action taken later on.

Jagat Ram V. State, Cr. Misc. Appln. No. 32 of 2008, D/- 27-7-51. AIR 1952 J&K 4 (H. C.) S. B.

Public Safety Act (XV of 2003) — Section 3 (I) — Arrest and detention of suspected person — — Warrant of arrest issued on receipt of complaints from individuals — Arresting authority did not satisfy itself before the arrest that the arrested person acted in a manner prejudicial to public safety or peace—Effect.

Held that the Public Security Act specifically provides that the arresting authority should be satisfied that the applicant has acted, is acting or is about to act in a manner prejudicial to the public safety or peace before he makes the arrest. The arresting authority cannot make an arrest on the complaint received by him from other persons that the person is acting or is about to act in a manner prejudicial to public safety or peace. Tne legislature has laid great responsi!ility on the arresting authority that he should be satisfied before he makes the arrest and not go by what other persons say about the individual whom he is going to arrest.

Onkar Singh AIR 1948 All. 414 followed. V. State, Cr. Misc. No. 93 Of 2005, 7 J&K LR 73 (H. C.) S. B.

Puclic Safety — Jammu and Kashmir Public Security Act (15 of 2003 Sm) Ss. 3 (2) and 38 A—Annexure to Cabinet Order No. 928 C of 1949, D/- 27- 11- 48. — Validity.

According to S. 38A, Public Safety Act, the Government can delegate only those powers to an officer or authority which it possesses. Neither S. 3 (2) nor any other section of the Act confers any power on the Government to transfer a detenu from one place of custody to another. The committal to custody has in all cases to be made by the officer who has effected or directed the arrest of the detenus, and therefore, the Notification (Annexure to Cabinet Order No. 928C of 1949, D/- 27- 11- 48) by which powers of transfer are deemed to have been delegated to the Hon'ble Home and Dy. Prime Minister is ultra vires of S. 3 (2) and S. 38 A of the Act.

Gh. Nabi Jan V. State, Misc. Cr. case No. 109 of 2010, D/- 28-7-1953. AIR 1954 J&K 7 (H. C.) D. B.

Public Safety — Preventive detention — Directions as to execution of order of detention given in order of detention — Failure to follow — Effect — (Jammu and Kashmir Preventive Detention Act (4 of 2011), S. 4 — (Preventive Detention Act (1950), S. 3).

Preventive detention is a serious inroad on civil liberties and as such any law which in any way curtails civil liberties has to be very strictly construed. The court has to see if the law as it is, has or has not been meticulously followed, and it is finds even a hairbreadth deviation made from the express provisions of law or a slight disregard of any direction given according to law it shall have no hesitation in declaring a detention under such circumstances

quite illegal. This shall apply with greater force in Kashmir as the law there is somewhat different and even a bit harsh when compared to the law in force in the other Indian States. When directions as to the execution of an order of detention are given in the order of detention itself, those directions have to be meticulously followed. Hence, where the order of detention has provided that a notice of the said Order shall be given to the detenu by delivering a copy of this order to him, and no such copy is delivered to him, the order of detention is bad.

Hissam.-ud-Din and Ors. V. The State Cr. Misc. Matters, Habeas Corpus Applns. Nos. 173 to 176 of 2011, D/- 18- 1- 1955. AIR 1955 J&K 7 (H. C.) F. B.

Public Safety — Preventive Detention Act (1950), S. 8 — Grounds supplied to detenu — Introduction of irrelevant matter — Effect.

The grounds supplied to the person detained should show relevancy to the object which the Legislature has in view, namely, the prevention of objects prejudicial to the maintenance of law and order. For, introduction of irrelevant matters vitiates the detention order as a whole, though there may be only a few grounds that are irrelevant or illusory.
AIR 1954 SC 179, Foll.
Cases Referred :
AIR 1954 All 315 : Cri LJ 685
AIR 1953 SC 318 : Cri LJ 1241 (SC)
AIR 1954 SC 179 : 1954 Cri LJ 456 (SC)

Ghulam Qadir Hawabaz V. State, Cr. Misc. Appln. No. 12 of 1955 D/- 17- 6- 1955. AIR 1955 J&K 35 (H. C.) F. B.

Public Safety — Preventive Detention Act (1950), S. 19 — Does not contravene Art. 20, Constitution of India — (Constitution of India, Art. 20).

It is true that Art. 20, Constitution of India forbids the trial and conviction of a person according to a law which was not in force at the time when the offence was committed; but proceedings under the Preventive Detention Act are not judicial proceedings and preventive detention by itself not a conviction or sentence of imprisonment. Section 19 which is of the nature of an expost facto law which has been framed to govern the cases of those detenus who were arrested under earlier laws now repealed and whose remedies available to them then have now been taken away from them. does not, therefore, contravene the provision of Art. 20.

G. A. Ashai V. Staie, Cr. Misc. Appln. No. 4 of 2010, D/- 22- 7- 1954, AIR 1954 J&K 59 (H. C.) F. B.

Public Safety — Preventive Detention Act (1950), S. 19 — Effect of, on High Courts powers — (Constitution of India, Art. 32) — (Criminal P. C. (1898), S. 491.

Section 19 appears to limit the powers of the High Court in respect of those detentions to whom S. 19 applies but it has to be kept in view that the powers of issuing writs of habeas corpus are guaranteed to the High Court by the Constitution and also similar orders can be issued under S. 491. Criminal P. C. No doubt the scope pf S. 19 is wide enough yet it does not affect the power of the High Court to scrutinize the orders under which detentions are made.

The Court has to see whether the detention order which is challenged is made or appears to have been made under a valid law. If a detention order appear to have been made under a valid law the Courts cannot interfere with that order and cannot release the detenu but if the circumstances show that the order has no sembalance of having been made under any valid law in respect of detention the Courts can release the detenu.

Anno. Criminal P. C. S. 491, N. 3, 7.

G. A. Ashai V. State, Cr. Misc. Appln. No. 4 of 2010. D/- 22-7-1954. AIR 1954 J&K 59 (H. C.) F. B.

Public Security Act (XV of 2003) — Section 3 — — Arrest and detention of suspected persons — Power of the Court to interfere in the order passed.

Held that under section 3 of the Public Security Act the sufficiency or insufficiency of material which might have satisfied the authority affecting the arrest is a matter for the decision of that authority alone which passed the order of detention. The material which is produced before such authority may not be sufficient for a Court of law for determining whether it was necessary to keep the detenue in detention. But the Court cannot substitute its own judgment for the judgment of the authority ordering detention, nor can the Court go into the question whether the grounds which satisfied the detaining authority were reasonable or sufficient. It is not a matter which can be scrutinised or inquired into by a Court of law. If the authority detaining a person affirms that it was satisfied that the person was acting in a manner prejudicial to public safety or peace and the order was drawn in strict confirmity with the terms of law the Court cannot question the fact of his satisfaction. The best judge to decide what is reasonable satisfaction is the person who effects the arrest.

Devi Saran V. State, Cr. Misc. No. 92 Of 2005, 7 J&K LR 46 (H. C.) Single Bench.

Public Security Act (XV of 2003), — Section 3 — Arrest and detention of suspected persons — When High Court can interfere in the order passed.

Held that if the recital about the satisfaction of the detaining authority in the order that there were reasonable grounds for believing that any person was acting in a manner prejudicial to the public safety and peace, is not correct and the order is not drawn in a manner and in conformity with the Statute, the High Court can declare the order to be invalid ane the detention of the person concerned to be illegal. AIR 1944 Pat 354 and 1948 All. 414 referred to.

Devi Saran V. State, Cr. Misc. No. 92 of 2005, 7 J&K LR 46 (H. C.) Single Bench.

Public Servants (Inquiries) Act 1977 — — does not restrict the power of dismissal of His Highness or His Government.

The Public Servants (Inquiries) Act 1977 is an optional measure which gives the Government power in certain circumstances to institute a public inquiry under that Act in regard to alleged misbehaviour of a public servant. But it is not bound to take any action under that Act if it does not wish or consider it proper to do so. This is made plain by the wording of S. 2 of the Act and

it is not possible to treat the provisions of this Act as constituting any restriction upon the power of dismissal which His Highness or which His Government may possess independently of the Act.

Anchal Singh V. Government, Appeal No. 15 of 1949. D/- 17- 6- 1950. AIR 1951 J&K 1. (Board of Judicial Advisers).

Ranbir Penal Code. S. 161 — Charge under easy to make and difficult to establish — burden on the prosecution.

A charge under S. 161 is one which is easily and may often be lightly made, but is in the very nature of things difficult to establish, as direct evidence must in most cases be meagre and of a tainted nature. These considerations cannot however be suffered to relieve the prosecution to establish the charge beyond reasonable doubt. If after every thing that can legitimately be considered has been given its due weight. room still exists for taking the view that however strong the suspicion raised against the accused every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal.

Badri Nath V. State Cr. appeal No. 1 of 1952, D/- 18- 8- 1952. AIR 1953 J&K 41 (Board of Judicial Advisers)

Ranbir Penal Code (XII of 1989) — Section 302 — Murder — — Accused confessed guilt before the Committing Magistrate at the time when the whole case for the prosecution had been discussed in the Court — Statement of the approver corroborated in all essential details by the statement of an eye-witness — Motive for the murder duly established.

Held that the case against the accused appears to us to be proved to the hilt that he is personally responsible to have committed the murder.

Thakur Dass V. Stote, Cr. Appeal No. 2 of 1949, 8 J&K LR 99 (Board of Judicial Advisers)

Ranbir Penal Code (XII of 1989) — Section 302 — Murder — — Injuries rot found to be on vital part of the body — Contention of the defence that as there was no intention to kill, offence fell within the arbit of section 304.

Held that this contention is entirely without force. The injuries found were according to the doctor, sufficient in the ordinary course of nature to result in death and in these circumstances death was inevitable. That a akilful surgeon who had all surgical facilities at his disposal immediately may possibly have presented death is really not relevant as this is not a reasonable possibility. Even if the treatment of the patient had not been skilful, the charge of murder could not be avoided on this ground.

Rehmat V. State, Cr. Appeal No. 1 of 1949, 8 J&K LR 69 (Board of Judicial Advisers).

Ranbir Penal Code (XII of 1989) — Section 302 — — Murder — No motive established for the commission of offence — Apparently the murder and the deceased on good terms

Held that it is not necessary for the prosecution to establish the existence of a motive by the prosecution when the evidence is otherwise cogent and clear.

Rehmat V. State, Cr. Appeal No. 1 of 1949, 8 J&K LR 68 (Board

of Judicial Advisers)

Ranbir Penal Code (XII of 1980) — Sections 302 and 201 — Murder and causing disappearance of evidence of an offence — The co-accused's acqittal on the ground of non-availability of evidence of their complicity and non-establishment of their identity — — The accused did not take part in inflicting injures which eventually resulted in the death of the deceased though he took active part in disposing of the dead bodies with the view to obliterate marks of evidence of the crime — — Whether accused can be convicted under section 302.

Held that it will be very unsafe to base the conviction of the accused under section 302 by reasons of the provisions of section 34 R. P. C The accused-committed an offence which falls within the mischief of section 201 R. P. C.
I. L. R. 8 Cal. 739 relied upon.

Amar Nath V. State, Cr. Ist. Appeal No. 4 Of 2005, 7 J&K LR 187 (H. C.) D. B.

Record of Rights — Entry of status in whether a necessary qualification — Tenancy Act — S. 18 read with S. 85 Group Second (m)

Held that a suit for the recovery of mesne profits does not lie in a Civil Court.

Further held that the record of status in the Record of Rights is not a necessary qualification. This is supported by the definition in clause (7) of section 2 of the Tenancy Act, which says "tenant" and "landlord" include the predecessors and successors in interest of a tenant and landlord respectively.

Madan Lal V. Dharam Singh Civil First Appeal No. 102 Of 2002, 7 J&K LR 6 (H. C,) D. B.

Registration Act — S. 47 The time from which a registered document would commence to operate —

Held that under section 47 of the Registration Act a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of registration. From this it is clear that the transfer of occupancy rights took place on 29-11-1994, and according to section 66 of the Tenancy Act the period of 6 years will begin to run from this date and not from the date of the registration of the sale deed. The suit having been brought on 2-1-2005 i. e. after 6 years one month and some days from the date of the execution of the sale deed is clearly beyond time.

AIR 1936 Cal. 17 dissented from.
1934 All. 70, 35 I. C. 347 ; 1937 Nag. I 1927 P. C. 42, 1928 P. C. 86
1926 All. 549 referred to.

Bhagat Ram V. Th. Kishan Singh & Ors. Revenue IInd. Appeal No. 20 of 2004, 7 J&K LR 243 (Boa.d of Judicial. Advisors)

Registration Act (1908), S. 49 — Collateral transactions — — Nature or character of possession.

In a suit for injunction restraining the defendants from interfering with rights of ownership of the plaintiff in the property in suit; the defendant sought to adduce in evidence an unregistered rentdeed

in which the plaintiff had admitted that the property in suit belonged to a third person.

Held that the rent deed was admissible in evidence for the collateral purpose of showing the plaintiff's assertion as regards the character of his possession. The nature or character of a person's possession is really proof of a transaction showing in what character a person has come upon the land. Such a transaction is really a collateral one which, by itself, does not require to be affected by a registered deed. An unregistered document is, therefore admissible as evidence of the nature or character of a person's possession. AIR Com. On Registration Act, S. 49 N. 14, Foll.; 5 J&K. LR 153, Rel. on.

Anno. AIR Com. Regn. Act, S. 49 N. 14: 1950 Mula: S. 49 P. 186 N "Callateral.....instrument" and P. 188 N. "As..... possession (Case law in AIR Com. note exhaustive).

Cases Referred:

AIR 1934 Lah 885: 16 Lah 313 1923 Lah 495: 4 Lah 249 1939 Lah 658: 186 Ind Cos 106 5 J&K LR 153.

Ali Mohd Bawan V. Gh. Mohi-ud-din & Ors. Civil Revn. No. 107 of 2010, D/- 10- 10- 1955, AIR 1956 J&K 24 (H. C.) D. B.

Registration Act (1908), S. 49 — Unregistered document -- evidence as to nature and character of possession — — (Jammu and Kashmir Registration Act (1908), S. 49).

Under S. 49, Registration Act a compulsorily registerable document, though unregistered and inadmissible in evidence of a transaction affecting immovable property, may be admitted as evidence for any purpose other than that of creating or declaring a right to immovable property such as for explaining the nature and character of the possession. The fact that a Proviso similar to that added to the S. 49 of the Indian Registration Act, is absent in S. 49 of J and K Registration Act would make no difference.

Anno. AIR Com: Reg. Act, S. 49 N. 14 :1950 Mulla, S. 49 P. 186 N. "Collateral.....instrument" and P. 188 N. "As.....posseion" (Case law in AIR Com. exhaustive).

Case Referred:

9 Cal 520: 12 Cal LR 209 (FB)
AIR 1919 PC 44: 43 Mad 244.

Musa & Ors. V. Amir Wani, Civil Revn. No. 54 of 2011, D/- 20- 12- 1954. AIR 1955 J&K 31 (H. C.) S. B.

Rendition of accounts — Suit for — Dissolved partnership — — Suit dismissed on the preliminary ground that accounts were finally settled on a plea raised in defence — Piaintiff not given opportunity to prove his case that no accounts were settled — — No fair and proper trial.

Held that the findings that accounts have already been settled and no case for re-opening of accounts has been made out, cannot be arrived at without framing proper issues and without giving an opportunity to parties to produce all their evidence. There has not been a fair and proper trial of the controversy between the parties.

The case was remanded by the Board.

Kundan Lal V. L. Lachman Dass & Ors. Civil Appeal No. 8 Of 1947, 7 J&K LR 230 (Board of Judicial Advisirs).

Res Judicata

Held that it is a well established rule of law that for the plea of res-judicata to prevail it is not always necessary that there should have been an express finding on the relevant issue and if the decision in the former suit cannot be accounted for except on the supposition that the issue arising in the subsequent suit was decided the decree will operate as res-judicata on such issue.

51 I. A.page 293 ; S. C. 51 Cal. P. 631 and ILR 15 Bombay P. 89 followed.

Ahad Ganai V. Dewan Jewan Nath Madan, Civil Appeal No. 18 Of 1947, 7 J&K LR 218 (Board of Judicial Advisers)

Res - judicata — Application of — Requisites stated.

Held that in order that a previous decision in a suit is made applicable to a particular case on the ground of res-judicata it is necessary that .—

(a) the matter directly and substantially in issue in the subsequently suit must have been directly and substantially in issue in the former suit;
(b) the former suit must have been between the same parties or under whom they or any of them claim ;
(c) such parties must have been litigating under the same title in tne former suit as in the present suit ;
(d) the Court trying the former suit must have been a Court of competent jurisdiction and the matter in issue in the subsequent suit must have been heard and finally decided in the first suit.

Ramloo Malik & Ors. V. Abdullah & Ors. Civil Appeal No. 10 of 2006, 8 J&K LR 204 (H. C.) D. B.

Res-judicata — Declaratory decree passed by a civil court to the effect that the defendant was a State Subject and an agriculturist — Plaintiff not a party to the decree — — — —Decree obtained against the State whether operate as re-judicata.

Held that sections 4 and 5 of the State Land Alienation Act, were enacted by the State for the protection of its subjects; the underlying policy being to prevent the passing of agricultural lands to persons who are not State subjects or are outside the agricultural community. Normally it is the State who would contest the claim of a person to have that status. In any suit, therefore, which may be brought by or against the State in which the status of a person claiming to be State Subject and an agriculturist is in issue the State represents the entire community for whose benefit section 4 and 5 had been enacted. In such a case the State represents all interests which would be effected by the result of the suit. In the absence of fraud or collusion the decree passed in such a suit will be binding not only upon the State but all those persons who were represented by the State. Though the judgment is not a judgment in rem so as to be binding on the whole world it will nevertheless bind a limited class of the public, namely, those who had an interest in the determination of the question whether the person concerned is a State subject and an agriculturist.

Dewan Anand Kumar Madan, V. Bhai Anant Singh, Civil Appeal No. 5 Of 1948, 8 J&K LR 47 (Board of Judicial Advisers)

Res-judicata — — Suit decreed in favour of a party but adverse

finding against him on one point not necessary for the passing of the decree — Finding not to operate as res-judicata.

Where a suit is decreed in favour of a party but there is an adverse finding against him on one point whic is not at all necessary for passing the decree, the finding cannot operate as res judicata as between the parties and as such the successful party is not competent to appeal against that finding. 3 J&K LR 186, Rel. on; Chitaley's Civil P. C., Ref. to

Anno. Civil P. C., S. 11 N. 108, 109 and 110; S. 96 N. 6 Pts. 9, 13 and 14 .

Mohd Mir V. Gh. Mohi-ud-din & Ors. 2nd Appeal No. 35 of 2006 D/- 1 Bhadon 2007. AIR 1954 J&K 32 (H. C.) S. B.

Responsible Govt — Ushering of in the State of J&K — Proclamation of His Highness dated 5- 3- 1948.

On 5-3-1948 His Highness issued a proclamation by which he appointed a Cabinet to carry on the administration of the State. Sheikh Mohd Abdu'lah was appointed the Prime Minister and all other ministers were appointed on his advice. The Proclamation laid down that the Cabinet would act on the principle of joint responsibility.

Maghar Singh & Ors. V. Principal Secy. J&K Govt. 1st. Appeals No. 29 of 2008 and 4 of 2009, D/- 25- 3- 1953. AIR 1953 J&K 26 (H. C.) D. B.

Restitution — Order passed by Munsiff under Circular No. 136 — — Right to restitution an inherent right, apart from S. 144 CPC — Power exercisable under S. 151 CPC when the case not falling strictly under S. 144 CPC.

Held that this a relief which every successful suitor can claim. The right to restitution is an inherent right possessed by every suitor apart from section 144 CPC and the jurisdiction to make restitution is inherent in every Court and shall be exercised whenever the justice of the case demands. Powers can be exercised under section 151 CPC when the case come strictly under section 144 CPC.

S. Seva Singh V. Ghulam Mohd, Civil Revision No. 6 of 2006, 8 J&K LR 198 (H. C.) S. B.

Restoration of Property Ordinance (XXIX of 2004) sections 5 and 6 — Whether orders passed under the Ordinance are subject to revision by the High Court.

Held that the orders passed under the Ordinance by a Magistrate or the Sessions Judge are subject to revision by the High Court. Section 6 of the Ordinanre does not oust the jurisdiction of the High Court to hear revisions against such orders. Ordinarily High Court can hear revisions against a Judicial Crder passed by a Magistrate or a Sessions Judge, unless this jurisdiction is taken away by express words in a Statue. Maxwell's Interpretation of Statutes: r 116, A. I. R. 1925 Cal. 1251, A. I. R. 1933 Bombay 59, A. I. R. 1928 Mad. 495.

Raj Allas Des Raj and Anr. V. Mst. Batul Begum. CR. Revision No. 56 Of 2006. 9 J&K LR. 69 (H. C.) D. B.

Restoration of Property Ordinance (XXIX of 2004) — Whether

orders passed by a Magistrate under the Ordinance are of an executive nature acting not as a Magistrate but as a person a designata.

Held that an order passed by a Magistrate under the Ordinance is a Judicial order and not an executive order. A judicial act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights of others.
A. I. R. 1946 Bombay 280 referred to, A. I. R. 1946 Bombay 533 distinguished.

Raj Allas Des Raj ond Anr. V. Mst. Batul Begum, Cr. Revision No. 56 Of 2006. 9 J&K LR 69 (H. C.) D. B.

Re-trial — Destruction of record.

Held that under the present circumstances the onlycourse which the learned Sessions Judge should have followed was to order a re-trial. The provisions of Section 423(1) Criminal Procedure Code are mandatory. According to section 422 Criminal procedure Code if the appellate Court does not dismiss the appeal summaraly, it shall give notice to the appellaut and to such officer as the Government may appoint in this behalf. According to section 423 (1) Criminal procedure Code the appellate Court shall then send for the record of the case is such record is not already in the Court, and after perusing such record. Pass an order according to law. The learned Sessions Judge had not dismissed the appeal, summarily but had sent for the record of the case. Under these circumstances it was incumbent upon him to peruse such record.
AIR 1943 Mad 391(2) referred to.

Rehman Mochi V. State, Cr. Revision No. 10 of 2006, 8 J&K LR 157 (H. C) S. B.

Retrail — Enemy Agents Ordinance (8 of 2005) section 9 Reviewing Judge in a revision against order of acquittal can only order a retrial but cannot convert a finding of acquittal into that of a conviction.

Held that a reviewing Judge cannot convert a finding of acquittal into a convic ion but can only order a re-trial, in case he makes his mind to accept the revision petition. The reviewing Judge while hearing a revision under section 9 (3) of the Enemy Agents Ordinance can exercise only those powers as are enumerated in section 439 of the Code of Criminal Procedure.

State V. Dr. Abdul Majid & Ors. Cr. Revision No. 36 Of 2006. 9 J&K LR 54 (H. C.) Single Bench.

Retrospective — Clauses 13 of House Rent Control Order 2000 amended after filling of the suit and drawing up of issues but before the decree — Whether retrospective effect — What type of suits may be construed to be retrospective.

Held that suits which are declaratory or explanatory or procedural may be construed to be retrospective, but ordinarily no other statute is to be construed to be retrospective unless it expressly or impliedly says so. On the contrary a Statute which affects vested rights is ordinarily presumed not to be retrospective. It may further be stated that the House Rent Control Order by its very nature cannot be retrospective unless it is oxpressly so stated.

Th. Harison Club V. Mr. Krishen Gopal, Civil IInd Appeal No. 2003, 7 J&K LR 113 (H. C.) D. B.

Revenue Records — Entries in — Evidentiary value of — Whether grievance about the late production of these documents entertainable at a late stage.

It may be correct that revenue records are maintained for fiscal purposes and by t emselves they cannot confer any title upon any person but the revenue records may contain entries which may throw light upon the nature of a man's possession and if the nature of a man's possession is in issue and the revenue records throw light upon it they are not only admissible but they are valuable documents for that purpose.

It is not clear by what procedure the late production of the documents was justified but it is clear that the respondent raised no objection to their reception in evidence in the trial Court or in other Courts below. And it is not possible at this late stage to entertain the grievance about the production of the documents.-

Shiv Ram & Ors. (Plaintiff - Appallants) V. Ramoon Shah & Ors. (Defendant - Respondent) Civil Appeal No. 11 of 1947, 6 J&K LR page 119 (Board).

Revenue records — — Entry in of proprietory interest whether sufficient by its force to create or extinguish propritory rights in persons affected by the entry.

The entry of proprietary interest in Revenue records is good enough for revenue purposes but it is not sufficient by its own force to create or extinguish proprietary rights in persons affected by the entry. And the order of removal of a man's name from proprietary column of revenue records even when accompanied by a consenting statement does not divest him of his proprietary interest in the land unless it is possible to find a valid grant upon the consenting statement.

Bhagtu & Others V. Wazir Moti Ram & Ors. Piaroo & Ors. V. Wazir Moti Ram & Ors. Civil Appeals Nos. 11 & 12 of 1950, 9 J&K LR 128 (Board).

Revenue Record — Entry in — — Removal and substitution of a name of a proprietary column by the final order of the Ruler does not operate as a Crown grant —

He'd that the entry in the Revenue Records by which A's name was removed and B's name was substituted in the proprietary column of the record by the final order of the Ruler did not operate as a Crown grant in favour of B as there were neither the words of express grant nor any intention to make one.

Bhagtu & Ors. V. Wazir Moti Ram & Ors. Civil Appeals Nos. 11 & 12 of 1950, D/- 10- 7- 1950. AIR 1951 J&K 14 (Board of J. Adrs.)

Review — Compromise involving minor as a party — Leave of the Court not obtained. — Whether application under section 151 C. P. C. to set aside order recording compromise can be treated an application for review.

The question whether an application made under S. 151, Civil P. C. could or could not be converted into an application for review under O. 47, R. 1 of the Code depends upon the circumstance

of each case. Where the order recording the compromise was obviously erroneous as it contravened the provisions of O. 32. R. 7 of fhe Code and application to set aside the compromise was made within one month of the order recording the compromise, in other words within the poriod of limitatian allowed for an application for review, the application should be treated as one under O. 47, R. 1, even though it was in terms under S. 151. Urder 47, R. 1 is wide enough to cover a case of correction of this nature. The only impediment in treating this application as an application for review is the lack of payment of necessary court-fee, which can be demanded and made good at anv stage of the proceedings. Anno: Civil P. C., O. 47, R. 1 N. 16, 16a, 22 O. 32, R. 7 N. 5, 20; S. 151 N. 3.

Mst. Taja V. Mst. Azizi, Civil Appeal No. 2 of 1953, D/- 18-6- 53. AIR 1954 J&K 31 (Board of Judicial Advisers)

Review — — C. P. C. O. 47 r. 1 — Whether lies on a question which might and ought to have been raised but not raised

Where a question based on certain amendment which might and ought to have been raised before the Board at the time when the appeal was heard is not raised, no review can be granted for decision of such question

Jana & Ors. V. Ghulam Nabi, Review Appln. No. 3 of 50 D/- 11- 6- 1951. AIR 1952 J&K 12 (Board of Jud. Advisers).

Review — C. P. C. 0. 47, Rule 1, — Whether lies on an erroneous finding of fact

An application for reviow cannot be entertained for reconsideration of a question of fact on which the Board, after considering all the circumstances of the case, arrived at a clear finding. Anno. CPC O. 47, R. 1, N. 17-A

Review Appln. No. 3 of 50 D/- 11- 6- 1951, Jana & Ors. V. Gh. Nabi, AIR 1952 J&K 12 (Board of Judicial Advisers)

Review — Inherent power of the Court to remedy injustice done by abuse of the process of Court — Though review not specifically provided.

It is a well settled principle of law that by adopting a procedure something has been done which the Court never intended to do and which results in the miscarriage of justice, then the Court has ample powers to remedy the wrong done. The injustice so done can be and must be remedied on the principle actus curia nominom gravabit an act of the Court shall prejudice no person. An abuse of the process of the Court may result from a default or mistake of the Court itself or its officer or as the result if misrepresentation made by a party. In all such cases the Court has got an inherent power to make such orders, as may be necessary for the ends of justice or to prevent the abuse of the process of Courts.

Bhagat Prith Chand V. L. Narain Das, Civil Revision No. 28 Of 2006, 8 J&K LR 180 (H. C.) Single Bench.

Review — Whether the J&K Big Landed Estates (Abolition) Act 2007 is open to the review of the Courts.

In fact no legislation made by the Yuvraj outside the matters within the competence of Parliament can form the subject matter of review in a Court of law just as no Act of British Parliament

could be declared ultra vires by any Court.

Maghar Singh & Ors. V. Principal Secretary J&K Covt. Ist Appeal No. 29 of 2008 and No. 4 of 2009, D/- 25- 3- 1953. AIR 1953, J&K 26 (H. C.) D. B.

Revision — Accused convicted under S. 457 RPC and sentenced — Appeal to the Sessions Judge — After filling of appeal record destroyed in the lower Court — Sessions Judge dismissed appeal without perusing record.

Held that under the present circumstances the only course which the learned Sessions Judge should have followed was to order a re-trial. The provisions of Section 423(1) Criminal Procedure Code are mandatory. According to section 422 Criminal Procedure Code if the appellate Court does not dismiss the appeal summarily. it shall give notice to the appellant and to such officer as the Government may appoint in this behalf. According to section 423 (1) Criminal Procedure Code the appellate Court shall then send for the record of the case if such record is not already in the Court, and after perusing such record, pass an order according to law. The learned Sessions Judge had not dismissed the appeal, summarily but had sent for the record of the case. Under these circumstances it was incnmbent upon him to peruse sucn record.

AIR 1943 Mad 391(2) referred to.

Rehman Mochi V. State, Cr. Revision No. 10 of 2006, 8 J&K LR 137 (H. C.) S. B.

Revision — Against interlocutory orders — Order refusing amendment of plaint whether is a case decided within the meaning of S. 115 and open to revision — Interference by the High Court if discretion regarding refusal of amendment exercised arbitrarily.

An order refusing to allow amendment of plaint though interlocutory in nature is a case decided within the meaning of S. 115 and is open to revision. Meaning of 'case decided' discussed AIR 1948 Nag 258 (FB); 1926 Mad 1124 and 1939 Rang 92, Rel. on.

Where in refusing to allow amendment of plaint the subordinate Court has exercised its discretion arbitrarily, the High Court would be justified in interfering with it in revision.

Section 115(d), Jammu and Kasnmir Civil P. C. gives wider powers of revision to the High Court than under S. 115 Xicil P. C. Anno. CPC, S. 115 N. 4, 5, 20:

Mohd Maqbool V. Kadir Munjgaroo & Ors. Civil Revn. Appln. No. 12 of 2007, D/- 18- 9- 1950. AIR 1954 J&K 26 (H. C.) D. B.

Revision — — Against order under Rule 59 — A. J&K Defence Rules requisitioning house by District Magistrate — Order not as a District Magistrate but as a persona designata acting under powers specially delegated to him by the Govt — — Order not revisable by High Court.

Held that in this case the District Magistrate has acted not as a District Magistrate subordinate to the High Court, but as a person designata acting under powers specially delegated to him by the Government. As such anything that may be done by the Disirict Magistrate as a persona designata and which might contravene any law or directions of the Government is a matter for

the Government to go into and not this Court.
AIR 1947 All. 403; 1947 All. 51 & 1946 Bom. 533 (F. B.) followed.
Chet Ram Kohli V. State, Cr. Revision No. 51 Of 2006, 8 J&K LR 170 (H. C.) S. B.

Revision against the order setting aside exparte decree interference in revision by High Court if exercise of discretion arbitrary or unreasonable.

It is true that before an exparte decree is set aside the Court must come to a definite finding that there was sufficient cause for making such an order. But the discretion primarily for setting aside of the decree vests in the court and unless and until it is made to appear that the exercise of the discretion is arbitrarily or unreosonable, the High Court will not ordinarily interfere in revision.

AIR 1944 Iah 397, Re. on.
Anno: Civil P. C., O. 9, R. 13 N. 30.
W. Jagat Ram V. Salam Joo & Ors. Ciuil Revn. No. 85 of 2008, D/- 12-9-1952. AIR 1953 J&K 11 (H. C.) D. B.

Revision -- Debt Laws — J&K Distressed Debtors Relief Act (16 of 2006) — Ss. 18 and 29 — Order of Civil Court transferring or refusing to transfer case to Conciliation Board — When open to revision — Test —

Under Section 18 of the Act, any order right or wrong. which the Court is empowered to pass under the Act, cannot be challenged in revision. If, however, the Order which the Court has passed, is in excess of the jurisdiction conferred upon it by the Act, it cannot be one Passed under the Act. Such order can be challenged in revision. The test in each case will be whether in passing an order the Court acted within its jurisdiction and this will depend upon the circumstances of each case.

Hence an order of civil Court that a case should or should not be transferred to the conciliation Board under Section 29, even if erroneous will not be open to revision if the Court had jurisdiction to decide the question.

Degambar Sain V. Pt. Lachhman Dass, Ref. No. 1 of 1951, D/- 18-6-1951, AIR 1952 J&K 7 (Board of Judicial Advisers)

Revision — Enemy Agents Ordinance (8 of 2005) section 9 revision against order of acquittal by Special Judge — Revision competent.

Held that sub-section (3) of section 9 of the Enemy Agents Ordinance, 2005, empowers the reviewing Judge to call for and examine the record of any proceeding before the Special Judge for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed. The wording used in this section is almost the same as used in section 435 of the Code of Criminal Procedure and if the word 'revision' is not used in this section it makes no difference, as the word 'revision' is not used in section 435 even.

State Versus Cr. Abdul Majid & Ors. Cr. Revision No. 36 Of 2006. 9 J&K LR 54 (H. C.) Single Bench.

Reuision — Enemy Agents Ordinance (8 of 2005) section 9 — Revi-

sion against the order of acquittal by Special Judge — The reviewing Judge cannot convert a finding of acquittal into a conviction, can only order a retrial.

Held that a reviewing Judge cannot convert a finding of acquittal into a conviction but can only order a re-trial, in case he makes his mind to accept the revision petition. The reviewing Judge while hearing a revision under section 9 (3) of the Enemy Agents Oridinance can exercise only those powers as are enumerated in section 439 of the Code of Criminal Procedure.

State Versus Dr. Abdul Majid & Ors. Cr. Revision No. 36 Of 2006. 9 J&K LR 54 (H. C.) Single Bench.

Revision — Food offences (enhanced penalties) ordinance (3 af 2006). S. 11 — Revision to High Court against appellate order of Sessions Judge from Conviction recorded by Special Magistrate — Revision competent.

Held that revision to High Court against order of the Sessions Judge passed in appeal from the order of conviction by the Special Magistrate is competent, According to Section II of the Ordinance, the exclusion of interference in revision is limited only to the orders of sentences passed by a Special Magistrate. Intentron of the Legislature is to be inferred from the language used by them. A. I. R. 1943 All. 26, distinguished.

Qadir Chhandu Versus State, Criminal Revision No. 87 of 2006, 9 J&K LR 61 (H. C.) Single Bench.

Revision — Order by Special Magistrete — J&K Food Offences (Enhanced Penalties) Ordinance (3 of 2006), S. 11 — Appeal to Sessions Judge — Whether revision to High Court barred

It is only an order or sentence of a Special Magistrate which cannot be revised under S. 11 of the Ordinance, but when once an order is passed by the Special Judge in appeal agninst the order of a Special Magistrate, a revision application against such an order is not barred by. S. 11: AIR 1953 All. 26 Disting.

Qadir Chandu V. Stete, Cr. Revn. No. 87, of 2006, D/- 13 Har 2007, AIR 1952 J&K 46 (H. C.) S. B.

Revision — Order of acquittal by Special Judge — S. 9 (3) J&K Enemy Agents Ordinance — Revision competent — Powers of the reviewing judge — Only retrial can be ordered.

While hearing a revision application under S. 9(3), a Reviewing Judge can, by virtue of S. 9(2) of the Ordinance, exercise only those powers as are enumerated in S. 439, Criminal P. C. Under S. 439(4) the High Court is not authorised to convert a finding of acquittal into one of conviction. The only order which the Reviewing Judge can therefore, pass when he makes his mind to accept the revision petition, is to order a retrial. Anno. Cr. P. C. S. 439 N. 13.

State V. Dr. Ab. Majid & Ors. Cr. Revn. No. 36 of 2006, D/- 31 Jeth 2007, AIR 1952 J&K 41 (H. C.) S. B.

Revision — Order of acquittal by Special Judge — S. 9 (3) — — J&K Enemy Agents Ordinance — Revision competent — Powers of the reviewing judge — Only retrial can be ordered.

The wording used in S. 9(3) of the Ordinance is almost the same as used in S. 435, Criminal P. C., and though the word

'revision' is used in neither of them,a revision application is competent against an order of acquittal passed by the Special Judge, in as much as sub-s. 3 of S. 9 empowers the reviewing judge to call for and examine the record of any proceeding before the Special Judge for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed.

State V. Dr. Ab. Majid & Ors. Cr. Revn. No. 36 of 2006, D/- 31 Jeth 2007, AIR 1952 J&K 41 (H. C.) S. B.

Revision — Order passed by Mnusiff pursuant to Circular No. 136 — Circular confers jurisdiction on judicial courts and not on individual judges as persona designata — Order of the Munsiff therefore revisable.

Held that reference to the circular would show that the jurisdiction in the matter has been given to the judicial courts and not to an individual judge as persona designata and as such any order passed by a court under circular No. 136 is clearly revisable by this Court.

S. Seva Singh V. Ghulam Mohd, Civil Revision No. 6 of 2006, 8 J&K LR 198 (H. C.) S. B.

Revision — Order under S. 5 (B) J&K Agriculturists Relief Act (I of 1953) not appealable except the order specified in C1. (h) of S. 104, C. P. C. — Glaring injustice — The only remedy is revision

There is an obvious distinction between an order recording an agreement, a compromise or satisfaction and the final decree that should be made in accordance therewith.

An order under Rule 3 of Order 23 recording or refusing to record an agreement, compromise or satisfaction is appealable under O.43, R. 1 (m) irrespective of the consideration whether the decree that followed ft was a constant decree or not. The restriction that consent of the parties takes away the right of appeal does not attach to the order.

But udder S. 5(3), J. and K. Agriculturists Relief Act no appeal lies from any order passed by the Court in any such suit with the exception of the order specified in C 1. (h of S. 104, Civil P. C.), and therefore, an orde recording an agreement, a compromise or satisfaction under O. 23,R. 3, is not appealable and the only remedy by which a glaring injustice rising from such an order can be got removed is to apply in revision.

Anno. CPC, O. 23, R. 3, N. 32: O. 43, R. 1, N. 7: S. 96 N. 15. Cases referred.

AIR 1933 Bom 205 : 57 Bom 206
AIR 1944 Bom 239(2) : ILR 1944 Bom 405
AIR 1936 Mad 385 : 163 Ind Cas 161
AIR 1934 Cal 846 : 61 Cal 910

J. L. Raina & Ors. V. P. L. Raina & Ors. Civil Misc. Appeal No. 6 of 2010, D/- 11-12-53. AIR 1954 J&K 55 (H. C.) D. B.

Revision — Plaint allowed to be amended on payment of cost which was accepted by the defendant without prejudice to his right to go up in revision — Revision against the order of amendment not barred.

Order allowing amendment of plaint on payment of cost — Costs accepted by defendant and plaint amended — Accepetance of costs without prejudice to right to go in revision — Revision against order not barred.

Anno. C. P. C. O. 6, R. 17, N. 15.
1953 Mulla: O. 6, R. 17, P. 595 N. "Leave.....given" (Topic exhustively dealt with in N. 15 to O. 6 R. 17, in AIR Com. — 4 Pts. extra in AIR Com. note).
C. P. C., O. 6. R. 17 N. 21.
Civil P. C., S. 115 N. 5.
1953 Mulla :S. 115. P. 410 N. "Interlcutory order" (Lahore view indicated in Mulla is based on over-ruled case in AIR 1924 Lah 425 — Later F. B. case AIR 1943 Lah 65 which overruled AIR 1924 Lah. 425 not noticed in Mulla — Views of Ajmer-Merwara, Kutch Madhya Bharat, Rajasthan and Lahore (subsequent to 1943 Lah 65 (FB) and conflict between Lahore and Allahabad views not noted in Mulla — Solution of conflict not indicated).

Seth Kirpal Chand V. The Traders Bank Ltd. Jammu Civil Revn. No. 49 of 2CC9, D/- 11- 12- 53. AIR 1954 J&K 45 (H. C.) S. B.

Revision — Restoration of property ordinance (29 of 2004) S. 5 and 6 — Orders passed under the ordinance are subject to revision by the High Court, the order being a judicial order

Held that the orders passed under the Ordinance by a Magistrate or the Sessions Judge are subject to revision by the High Court. Section 6 of the High Court to hear revisions against such orders. Ordinarily High Court can hear revisions against a Judicial Order passed by a Magistrate or a Sessions Judge, unless this jurisdiction is taken away by express words in a Statute.

Mexwell's Interpretation of Statutes : r-116, A. I. R. 1925 Cal. 1251, AIR 1933 Pombay 59, AIR 1928 Mad. 495.

Raj Alias Des Raj And Another V. Msl. Batul Begum. Cr. Revision No. 56 Of 2006, 9 J&K LR 69 (H. C.) D. B.

Revision — Rule of interpretation — Ordinarily High Court can hear revisions against a Judicial order passed by a Magistrate or a Sessions Judge unless this jurisdiction is taken away by express words in a statute. Maxwell's Interpretation of Statute r. 116 AIR 1925 Cal. 1251, AIR 1933 Bom. 59, AIR 1928 Mad. 495.

Held that an order passed by a Magistrate under the Ordinance is a Judicial order and not an executive order. A judicial act is an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights of others.
AIR 1946 Bombay 280 referred to, AIR 1946 Bombay 533 distinguished.

Raj Alias Des Raj & Anr. V. Mst. Batul Begum. Cr. Revision No. 56 Of 2006, 9 J&K LR 69 (H. C.) D. B.

Right of Prior Purchase Act (II of 1993) — Section 4 —Application of right of prior purchase.

The plaintiffs purchased some plots from M who had pur-

chased the same from the Municipality through a contractor appointed by the former for effecting the sale of its plots - No registered sale-deed had been executed by the Municipality in favour of M though the sale had been confirmed by the Government - Defendant No. 1 purchased some land by a registered sale-deed fron defendant No. 2 who had also purchased this land from the Municipality under the aforesaid circumstances - The land purchased by defendant No. 1 was in close continguity to the residential house and land of the plaintiffs — — Whether the plaintiffs can exercise their right of prior purchase with regard to the land purchased by defendant No. 1.

Held that both according to the Transfer of Property Act and also according to the Municipal Act, the transfer in the name of M, cannot be held to be a valid transfer and as such the plaintiffs who have purchased this land even by a registered deed from M, cannot be said to be owners of this land so as to entitle them to exerecise the right of prior purchase with respect to the land in dispute.

Held further that the sale in the name of defendant No. 2 was not valid sale, the sale effected by him in his turn in favour of defendant No. 1 is not also a valid one and as such under section 4 of the Right of Prior Purchase Act, no right of prior purchase can be exercised againstsuch a tranfer of land.

Kashi Nath & anr. V. Pt. Lachman Joo & Anr. Civil original suit No. 14 of 2004, 8 J&K LR page 1 (H. C.) S. B.

Right of Prior Purchase Act (II of 1993) — Section 18 — No notice of the intended sale given to the plaintiffs pre-emptors by the seller defendant No. 2 — — Only the plaintiffs' father having given his refusal to the purchase of the land at the amount offered and sold to defendant No. 1 — — Whether the plaintiff's father's refusal an estoppel or waiver of the right of prior purchase.

Held that in order to raise a plea of waiver of right of prior purchase, it is not necessary that the procedure in Chapter IV of the Right of Prior Purchase Act of 1993 should be strictly followed Waiver or estoppel may also arise under general Law of Evidence. An offer to purchase the land in dispute was made to the father of the plaintiffs and he having refused to purchase the land on the price demanded he cannot but be held to have waived his right of prior purchase.

Kashi Nath & Anr. V. Pt. Lachman Joo & Anr. Civil Orig. Suit No. 14 Of 2004, 8 J&K LR 1 (H. C.) S. B.

Right of Prior Purchase Act (II of 1993) Section II — — Sale before the Act came into force — Sale - deed registered after the enforcement of the Act — Plaintiff's right of prior purchase — — Vendee's defence of acquisition of title by more than 12 years' adverse possession raised for the first time whether entertainable at a later stage.

Held that section II of the Right of Prior Purchase Act expressly provides that in respect of all sales not completed before the commencement of the Act, the right of prior purchase is to be determined by its provisions. It is clear that retrospective effect has

been given to the Act to that extent. The right of pre-emption was not altogether unknown in the State before the passing of the Act and the language employed by the Legislature in section II is so comprehensive as to cover cases of conf ict between the right of pre-emption existing before the Act and that created by the Act. and also cases in which no such right existed at all before the Act but it was created for the first time by the Act. The words "shall be determined by the provisions of this Act" are wide enough to cover both kinds of cases indicated above.

Held further that the plea of the defendant-appellant that he became full proprietor before the registration of the sale and no right of prior purchase can exist where a person acquires title not by transfer but by adverse possession, adopted for the first time before the Board should not be entertained at this stage.

Jamal Din V. Gopal Singh & Ors. Civil Appeal No. 15 Of 1947, 6 J&K LR Page 113 (Board)

Right of Prior Purchase Act — Ss. 14 and 15 — After adding of Art. 19 (1) (f) and (7) by the Constitution (Application to J&K Order) 1954 — Reasonableness of restrictions not justiciable.

In the State of Jammu and Kashmir, C 1. (7) added to Art. 19 of the Constitution under Para 4(d)(iii) of the Constitution (Application to Jammu and Kashmir) Order 1954, specially lays down that C 1. (5) of Art. 19 shall be construed as meaning such restrictions as the appropriate Legislature deems reasonable. Hence, if the Legislature has considered the restrictions to be reasonable keeping in view the fact that they are for the benefit of the State of Jammu and Kashmir to examine those restrictions in order to find out whether they are reasonable or not. The Constitution under C 1. (7) has itself ousted the jurisdiction of the Courts to examine the reasonableness of the restrictions which have been imposed by appropriate Legislature. The provisions, therefore, of Ss. 14 and 15 of the Right of prior Purchase Act, 1993, do not controvene Art. 19(1)(f) read with the new C 1, (7) added to the Article under paragraph 4(d)(iii) of the Constitution (Applicateon to Jammu and Koshmir) Order, 1954 AIR 1954 Hyd 161 (FB) — 1953 Punj 20 — AIR 1954 Punj 55, Ref. Anno. AIR Com., Const. of India, Art. 19 N. 20 (b) and 65.

Cases Referred :

A. AIR 1954 Hyd 161 : ILR (1954) Hyd 85 (FB)
B. ,, 1953 Punj 20 : ILR (1953) Punj 227
D. ,, 1954 Punj 55 : ILR (1954) Punj 232 (FB)

Tolodhu V. Nanak Chand & anr. Civil Revn. No. 91 of 2011, D/- 4- 4- 1955. AIR 1955 J&K 25 (H. C.) F. B.

Right of prior purchase Act (II of 1993) — Sections 14 and 15 — — Suit land which is agricultural situate within the Srinagar Municipality — Whether suit governed by section 14 or 15 — Difference between urban immovable property and agricultural land situated in a town or Municipalty.

Held that Section 14 does not exclude agricultural-land even if it is urban.

Ramzan Malik V. Gani Band, Civil IInd Appeal No. 306 Of 2003

7 J&K LR 162 (H. C.) F. B.

Right of Prior Purchase Act (II of 1993) — Section 14 (c) — Persons in whom right of prior purchase vests in respect of sales of agricultural land — Expression "owner of Mahal" explained — Direct proprietor of land in dispute preferred to owner of other land in the same Mahal — Direct proprietor not debarred to exercise his right of prior purchase merely because he had right under section 60 of the Tenancy Act, 1980 also.

There is nothing in the language of section 14(c) of the Right of Prior Purchase Act, 1993, to warrant the assumption that the direct proprietor of a land in dispute should be deprived of the right of pre-emption and preference be given to owner of other land in the same Mahal. The proprietor or owner of a Mahal may have certain peculiar rights under the Tenancy Act but that would not debar him from exercising other rights if available under other enactments.

Syed Karar Hussain & anr V. Syed Feroz Ali Shah & Ors. Civil IInd Appeal No. 145 Of 2003, 6 J&K LR page 67 (H. C.) S. B.

Right of Prior Purchase Act (II of 1993) — Sections 18 and 19 — Omission to reply to the offer made by the vendor to the pre-emptor — Plea of waiver

Held that in order to find a plea of waiver of a right of prior purchase in relation to a sale before the sale is completed, there must be representation, express or implied, on the part of the pre-empter not to claim the right of prior purchase or to accept the proposed sale by a vender to a stranger as binding upon him. The representation may be implied and may arise by conduct but it must lead to necessary inference that the right has been wived. An inference does not necessarily follow from an omission to reply to the notice of the pre-emptor or his agent's offer that the right of prior purchase had been waived.

Ghulam Haider Bhat V. Mst. Mali, Civil Appeal No. 2 of 1948, 8 J&K LR 62 (Board of Judicial Advisers)

Right of Prior Purchase Act (1993), Ss. 24 (1) and 26 (a) — Price to be fixed.

The right of prior purchase can only be exercised on payment of price fixed in good faith by the vendor or the vendee, or on payment of the price determined by the Court on the basis of market value. In dermintng the market value the price actually paid may be taken into consideration but it cannot form an independent ground for the exercise of the right of prior purchase. The view that the pre-emptors are entitled to exercise of the right of prior purchase on payment of price which the appellant has succeeded in proving is not correct and it is necessary to determine the market value of the property taking into consideration, among other matters, the payment of price which the appellant has succeeded in proving to the satisfaction of the Court.

Jamal Sofi & Ors. V. Mohd Sadiq & Ors. Civil appeal No. 4 of 1952 D/- 10- 9- 1952. AIR 1953 J&K 47 (Board of Judicial Advisers)

Right of Prior Purchase Act (No. II of 1993) — What amounts and what does not amount to — Extinguishment of right of pre-emption by waiver.

Held that when it is sought to extinguish a right of pre-emption by waiver it must be shown that there was some positive act amounting to relinquishment of the pre-emption right so as to operate as a forfeiture. Mere silence does not amount to waiver. A man may be present at the time of sale and not announce his intention of brin ing a suit to pre-empt but that does not debar him because he has a whole year in which to make up his mind nor is the question of want of funds relevant to the right to pre-empt.

Mst. Mali V. Ghulam Haider & Anr, Civil First Appeal No. Of 2003, 7 J&K LR 104 (H. C.) D. B.

Sale deed — Cancellation of — Who can demand cancellation.

The matter of cancellation of the document is one between the transferor and the transferee. The other parties affected by the sale deed can at best demand only a declaration that that deed will not affect their rights.

Chand & Ors. V. Bhagat Ram & Ors. Civil 2nd appeal No. 265 of 2002, 6 J&K LR page 40 (H. C.) Single Bench.

Sale deed — Whether void ab initio

Held that under section 47 of the Registration Act a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of registration. From this it is clear that the transfer of occupancy rights took place on 29-11-1994, and according to section 66 of the Tenancy Act the period of 6 years will begin to run from this date and not from the date of the registration of the sale deed. The suit having been brought on 2-1-2005 i. e. after 6 years one month and some days from the date of the execution of the sale deed is clearly beyond time.

AIR 1936 Cal. 17 dissented from.
1934 All. 70, 35 I. C. 347;
1937 Nag. I
1927 P. C. 42
1928 P. C. 86
1926 All. 549 referred to.

Bhagat Ram V. Th. Kishen Singh & Ors. Revenue IInd Appeal No. 20 of 2004, 7 J&K LR 243 (Board of Judicial Advisers)

Sanction for prosecution -- Under Hoarding and Profiteering Prevention Ordinance of (2000) S. 14 — Cannot be restricted to a particular FIR.

In the First Information Report, 6th Jeth 2001 was mentioned as the date on which an indictable transaction was made by the accused. Sanction under section 14 was obtained with respect to this particular F. I. R. On investgaton it transpired that the accused had committed offences of the nature contained in the F. I. R. on 13th and 14th Jeth and 3rd Har 2001 and this was represented in the challan before the trial Court. The offence was not found to have been committed on 6th Jeth 2001. The accused was acquitted exclusively on the ground that the offence was not committed on 6th Jeth 2001 and therefore the sanction was ineffective.

Held setting aside order of acquittal that the view taken by the trial Court was too narrow and the general provions of the

sanctioning cannot be restricted in such a limited way.

State V. Arjan Dass, Acquittal Appeal No. 1 of 2003, 6 J & K LR page 71.

Sanction — — Prosecution of Ministers — Sanction of His Highness not necessary — J&K Constitution Act 1996.

Held that there is not even a remotest suggestion in sections 6 and 7 of the Constitution Act, 1996, which might lead one to the conc'usion that sanction is necessary for the prosecution of ministers. The word "responsible" used in section 7 means that the appointment and removel of ministers vests in His Highness and that in administrative metters relegated to their charge they are answerable only to His Highness and that the legislature cannot, on an adverse vote passed by it, bring about the removal of a minister. The two sections referred to above being silent as regards sanction we have naturally got to refer to the provisions of the Criminal Procedure Code. The only section which deals with sanction for the prosecution of public servant is Section 179 Cr. P. C. According to this section any public servant who is not removable from his office save by or with the sanction of rhe Governmen and is accused of an offence alleged to hava been committed by him while acting or purporting to act in the discharge of his official duties cannot be prosecuted except with the previous sanction of the Government. Apart from ihe face as to whether the allegation against the accused is that he has acted in the discharge of his official duties or not but the mere fact that the accused was not a public servant removable by the Government this section does not and cannot apply.

AIR 1948 PC 128 referred to.

R. B. Ramchandra Kak V. State G. Revrsion No. 19 of 2005, 7 J&K LR 261.

Search — Provided for by S. 5 J&K Gambling Act but the manner and mode not provided — Applicability of Cr. Procedure Code — Ss. 165 and 103.

Section 5 of the Act which authorises the District Superintendent of Police to search does not provide as to how search has to be conducted. Hence by Section 5(2), Criminal P. C. the provisions of the Criminal Procedure Code relating to search will apply and the District Superintendent of police has to conduct the search in accordance wite S. 165 and under the general provisions of S. 103 of that Code. The words 'shall be prepared: in C 1.(2) of S. 103 would meen that the officer conducting the search should under his personal supervision control and direction prepare the inventory of the articles seized during the search. When it has been so made the search cannot be held to be not one according to law in as much as the list was not in the hand writing of the District Superintendent of police.

If on the other hand the search was not conducted under the direct supervision and control of the District Superintendent of Police and he signed the inventory only at a later stage, the presump tion under S. 6 will not arise as the search was not conducted according to law. Anno. Pub. Camling Act, S. 5 N. 4; S. 6 N. 1: Criminal P. C. 3. 165 N. 1, 12; S. 103 N. 16.

The State V. Sujan. Singh & Ors. Acquittal Appeal No. 1 of 2010,

D/- 9- 9- 53. AIR 1954 J&K 28 (H. C.) D. B.

Self - defence — Right of — Free fight resulting from the accused's party going to fence a plot, decree for possession of which had been passed in favour of a member of the accused party but stopped by complainants — One of the complainants' party killed by gun shot —
Held — Accnsed did not exceed right of self defence —

A decree for possession was passed in favour of a member of the accused's party and possession having been already given to him, the accused's party went to the plot to fence it. The complainant's party stopped them as a result of which free fight took place and several persons on both the sides were injured. A member of the complainants' party was killed by a gun shot from the accused.

Held (1) that the accused had a right of private defence and he had not exceeded it. It would not be fair to expect of an accused under such circumstances to weigh in golden scale the amount of force to be used by him. AIR 1955 NUC (Punj) 1953, rel. on.

(2) that it could not be argued that the accused should have approached the police before taking the law into their own hand. It is not the intention of Ss. 97 and 99, Penal Code to compel a person having the right of private defence to acquiesce in the act of the opposite party and instead of protecting his property, run to the police and leave the aggressors to do what the law entitled him to protect himselt against by executing his right of private defence. AIR 1934 All 829. rel. on.

(3) that from the fact that death had taken place in the complainants' party it could not be said that the accused persons were the aggressors: AIR 1954 All 35, Rel. on.

Cases Referredcr : AIR 1934 All 829 : 35 Cri LJ 780
1954 All 35 : 1954 Cr LJ 54
1936 Pat 622 : 38 Cr LJ 139
('35) 38 Pun L R 181
1955 NUC (Punj) 1353½ 55 Punj LR 343.

Jabar Dar V. State, Cr. Ist appeal No. 9 of 2011, D/- 11- 4- 1955 AIR 1955 J&K 9 (H. C.) D. B.

Sentence — Discretion to award — Discretion how to be exercised.

Held that the sentence no doubt, is in the discretion of the Sessions Judge, but he has to exercise that discretion in accordance with the well-known judicial principles and not quite arbitrarily in violent disregard of these principles.

Atta Mohd. V. State. State V. Gh. Mohd. & Ors. Cr. Ist. Appeal No. 55 Of 2006, Cr. Reference No. 10 Of 2006, Cr. Revision No. 58 Of 2007. 9 J&K LR (H. C.) 137 D. B.

Shop Rent Control Order, 2002 — Clause 8 — Certificate of being a good tenant obtained by the Defendant from the Controller after the institution of suit for ejectment and when he was no longer a tenant — Clause 8 does not apply.

Held that clause 8 will come to the rescue of a person in possession of some property only if he can show that he is a tenant on the date when an attempt is made to eject him. If the person can be shown not to be tenant on the date when a suit for

ejectment is brought against him, then clause 8 cannot in any way give him any relief. It is not every person who is in possession of immovable property belonging to some other person who can seek relief under clause 8 for instance a trespasser or a person in wrongful possession of some property cannot invoke the benefit of clause 8 of the Shop Rent Control Order. It is only a tenant who can seek the benefit of this clause.

Pt. Vasdev V. L. Karam Chand & Ors. Case No. 21 Of 2006, 8 J&K LR 191 (H. C.) D. B.

Specific Relief Act (1877), S. 22 — Discretion — Delay

Contract for sale of land — Suit for specific performance by vendee ten years after contract — Meanwhile vendor aquiring full proprietary rights in land which was originally tenancy land and making improvements — By enforcing contract plaintiff seeking to purchase the same at price agreed upon, when value of land had considerably increaeed due to war — Though delay in bringing the suit to enforce a contract per se may not be a ground to refuse specific performance, it is a relevant matter to be taken into consideration along with other circumstances to determine whether discretion should be exercised in favour or against the apecific performance (Specific performance refused). AIR 1922 PC 249, Helon.

Anno. Specific Relief Act, S. 22 N. 5.

Kharku & Ors V. Rasil Singh & Ors. Civil Appeal No. 3 of 1950. D/- 15- 6- 1953. AIR 1954 J&K 33 (Board of Jud. Advisers)

Specific Relief Act (1877), S. 54 — — Suit for mere injunction without prayer for possession

Where the plaintiff, alleging that the righ of collecting offerings made at a shrine vested in her, sued for injunction restraining the defendant from interfering with the exercise of that right by piaintiff, the question of possession of office does not arise and the suit cannot be dismissed on the ground that it was not maintainable in the absence of prayer for possession : AIR 1944 Mad 221 ; 1942 Mad 244 (FB) and 33 Mad 452. Disting.

Anno. Sp. Rel. Act, S. 54, N. 11.

Hafiz Mohi-ud-din V. Fatima Bano, 1st Appeal No. 11 of 2010, D/- 3- 9- 1953, AIR 1954 J&K 38 (H. C.) C. J.

Special leave to Appeal to the Board.

Held that the applicant has given a reasonable explanation for the delay in making his application in one case and for not making a petition to High Court in the other case. Ordinarily it is essential for the applicant to move the High Court first before coming to the Board. But as the two matters are inter-connected the Board is of opinion that in the special circumstances of the case both matters should be allowed agitated.

Raja Sahib Of Poonch, Petitioner V. Kirpa Ram — Opposite party Application for Special Leave to Application No. 49 Of 1946, 6 J&K LR page 143. (Board of Judicial Advisers)

Special Leave to appeal to the Board — Cases in which appeal lies.

Held that the ground on which leave to appeal is sought

has no substance. The suit was of a composite nature involving two separate and distinct claims; firstly for a declaration value at Rs. 3.000 and to this extent the appeal would lie directly to the High Court but this claim having been disallowed by the first Court the only claim which remained and which was in question in the Court of District Judge and the High Court was for pre-emption valued at Rs. 700. In this view there can be no doubt that the District Judge had jurisdiction so far as the suit related to pre-emption. The same is the case as regards the second appeal to the High Court.

Ali But V. Hamza Raina & Ors. Civil Appln. for Special Leave to Appeal No. 4 of 1948, (Board of Judicial Advisers) 8 J&K LR page 30.

Special leave to appeal to the Board — — — Enquiry about the question of valuation.

According to the value stated in the plaint for purposes of jurisdiction it was less than Rs. 2, 500/-. The petitioner, however, urged before the High Court that the actual market value of the property in dispute exceeds Rs. 2. 500/-. In these circumstances the High Court ought to have made enquiry into the correctness or otherwise of his allegation. This has been clearly laid down in section 5 of the Appeals to His Highness' Act.

Mst. Madri alias Shobawati ... ... Petitioner V. Ram Chand Baya (Opposite Party) Application for Special leave to appeal No. 54 of 1946. 6 J&K LR page 124.

Suit — — Whether cognizable by Civil Court. Land belonging to Govt. with plaintiffs having a right of pasture only — Land broken up for cultivation by defendants with the permission of the proprietors — Whether suit for declaration in a Civil court to the effect that the plaintiffs had a perpetual right of using the said pasture land is cognizable, to take the case out of purview of S. 133 Land Revenue Act (XII of 1996)

Held that the plaintiffs have claimed the relief of declaration and alleged propietery rights in themselves (without the slightest justification) in order to take the case out of the terms and scope of section 133 of the Land Revenue Act, which apparently does not contemplate a declaratory relief being granted by the revenue authorities. No party can claim a declaratory relief as of right and the civil Court, assuming it has jurisdiction will do well to refuse to grant it in a case such as this where the plaintiffs on their showing have rushed to the civil Court before actual interference with tneir alleged possession and without impleading the Government whose rights are substantially involved in the controversy between the parties. The Borad are of opinion that in any view of the case the plaintiff's suit was misconceived and was rightly dismissed.

Faqir Singh V. Basawa Singh & Ors. Civil Appeal No. 5 Of 1947 7 J&K LR 236 (Board of Judicial Advisers)

Suit Valuation Act (1887), S. 8 — Suit for accounts — Appeal — Forum.

For determining the appellate forum in account suits, wherein the plaintiff has the right to value his suit tentatively, the appellate forum will be determined not by the amount found due to the

plaintiff or the defendant, but by the value which the plaintiff puts on the subject-matter of his suit in the plaint. Case law discussed. Anno: S. V. Act, S. 8 N. 33.

Ganga Ram V. L. Madan Lal Kapur, Rev. First Appeal No. 28 of 2008, D/- 25- 9- 1952. AIR 1953 J&K 13 (H. C.) D. B.

Suits Valuation Act (1877), S. 9 — Rules under — (J&K) Suits Valuation Act (1997), — (J&K Civil Courts Act (1977), S. 34).

In regard to suits for pre-emption in relation to houses, the forum of the Court of appeal is determined not by valuation laid in the plaint but by the valuation determined by the judicial decision.

Jamal Sofi & Ors. V. Mohd Sidiq & Ors. Civil appeal No. 4 of 1952 D/- 10- 9- 1952. AIR 1953 J&K 47 (Board of Judicial Advisers)

Succession — Muhammadan Law — Custom

A custom supersedes the ordinary law so far as it is proved and everything beyond the proved custom must be governed by such law. Where a Muhammadan dies leaving his mother and a brother, their shares according to Muhammadan Law, are: mother 1/6th and brother the remaining 5/5th both taking in absolute right. The Muhammadan Law, however, stands superseded by a custom under which the mother instead of taking 1/6th in absolute right takes the whole for life and the brother, instead of taking only 5/6th immediately, takes the whole after the termination of the interest of the mother. The life interest becomes vested in the mother and the remainder becomes immediately vested in the brother. The daughters of the brother do not succeed collaterally, but they succeeded to the vested interest which their father possessed and though the latter died in the life-time of the mother his interest does not cease but devolves upon his daughters who became entitled to the share after the termination of the limited interest of the mother. The transferee from the mother having taken transfers of property in which his transfer had only a limited interest cannot be eniitled to any payment by the daughters as a condition precedent to a declaration being granted to them. 29 Cal. 828 PC Rel. On.

Ahad Lone V. Mst. Azizi, Civil Appeal No. 14 of 1950. D/- 1- 8- 1950, AIR 1952 J&K 11 (Board of Judicial Advisers)

Summary trial — Examination of accused if necessary — Effect of non-compliance.

The provisions of S. 342 are mandatory and the procedure of examining the accused so as to enable him to explain any circumstances appearing against him has to be followed even in summary trials.

Hence where in a summary trial the accused has been convicted on his own plea without his being examined under S. 342 and the record has not been prepared according to law, the conviction cannot be sustained. AIR 1951 All. 410, Rel. on.

Anno: Cr. PC. S. 263. N. 6: S. 342 N. 3.

Gh. Mohd. V. Municipal Committee Sgr. Cr. Ref. No. 63 of 2007, D/- 19 Jeth 2008, AIR 1952 J&K 21 (Board of Jud. Advisers)

Suppression of facts — — —Writ petition under Article 32 (2A) Constitution of India (as applied to the State of J&K) — Writ

petition whether maintainable.

A petition under Art. 32(2-a) as applied to the State of Jammu and Kashmir is maintainable and cannot be thrown out where there is no deliberate suppression of facts made by the petitioner in his petition.

Anno : AIR Com. Const. of India, Art. 226. N. 21.

Gh. Rasul V. State of J&K Misc. Appln. No. 23 of 1955, D/- 27- 9- 1955. AIR 1956 J&K 17 (H. C.) F. B.

Suspicion — No substitute for proof

It may be, and possibly is a fact, the evidence in the case disclosed facts that justified strong suspicions against the appellant, but this could be no justification for his conviction unless and until the prosecution succeeded in excluding every reasonable possibility of the appellant's innocence. In this connection it is well to bear in mind the following observations of the Federal Court in H. T. Huntley. V. Emperor', AIR 1944 F. C. 66(A):

"A charge under S. 161 is one which is easily and may often be lightly made, but is in the very nature of things difficult to establish, as direct evidence must in most cases be meagre and of a tainted nature. These considerations cannot however be suffered to relieve the prosecution of any part of the burden which rests upon it to establish the charge beyond ressonable doubt. If after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that however strong the suspicion raised against the accused every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal."

Badri Nath V. State, Cr. appeal No. 1 of 1952, D/- 18- 8- 1952. AIR 1953 J&K 41 (Board of Judicial Advisers.

Talak — Disapproval form of Talak — Though bad in theology yet good in law so far as Hanafi School of Sunni Muslims is concerned should be followed

There is no doubt that the Prohpiet was exceedingly averse to do this form of Talak and it is considered to be the most disapproved form of Talak but nonetheless, though bad in theology, it is good in law so far as Hanafi School of Sunni Muslims is concerned. It is also correct, as pointed out in the judgment of the Tehsildar Magistrate, that the prophet desired to put a great check on the capricious and irregular exercise of the power of divorce in the hands of husbands. He was pleased to pronounce :

"Talak to be the most detestable before God of all permitted things, as it prevented conjugal happiness and interfered with the proper bringing up of children." Under these circumstances, as pointed out in Amer Ali's Mohammadan Law referred to above, great divergence exists among the various schools regarding the exercise of the power of divorce by the husband on his own notion and without the intervention of a Judge.

It is also true, as stated by the Tehsildar Magistrate in his judgment, that it is highly desirable that the difference between the husband and the wife when their relations become strained,

should be referred to two arbitraters, one from the family of the hu band and the other from the family of the wife, and they sl ould do their utmost to bring about reconciliation between the parties. But I might as well point out that the verse in the Holy Quran giving this direction does not figure in the section relating to talak (divorce) in Sura Baqar (Chapter II, Sections 28 to 31 both inclusive) but is contained in Sura Nisa (Chapter IV, Section 6) which relates to the desertion by wife and it appears that according to Hanafis it is only a counsel of perfection. Be as it may, Hanafi School recognizes Talak-ul-Bidat and in view of its being least onerous for the husbands, it is the most prevalent form obtainIng in India. Any change in this respect cannot, be brought about by the Judicial interpretation. If there is a general desire among the Muslims to "revert to the pristine purity of Islam" how such changes in the present state of Muslim Law can be brought out, in the words of late Sir Syed Ameer Ali "Whether by a general Synod of Muslim doctors or by the direct action of the legislature it is impossible to say."

Ahmad Giri V. Mst. Begha Cr. Ref. No. 221/2011 D/- 7- 3- 1955, AIR 1955 J&K 1 (H. C.) D. B.

Talak — Kinds of Talak recognized by the Mtslim Law—

Now according to Hanafia, the 'principal Subdivision of Sunnia — almost all Sunnis of this sub-continent are Hanafies except a small Shafei minority of Bombay — two kinds of Talak are recognized by the Muslim Law, Talak-us-Sunnat and Talak-ul-bidat. Talak-us-Sunnat is again in two forms, namely "Ahsan" (the best) and "Hasan', (the next best). In the Ahsan form the formula of Talak is expressed only, once by the husband when the wife is in 'Tuhar', i. e. in a state of 'Tuhar', i. e. in a state of purity and this Talak, unless the husband resumes conjugal relationship, becomes irrevocable after three Tuhars which is equivalent to the period of Iddat. 'Hasan' is also a variation of the same form. In this the husband pronounces the formula during each of the three successive Tuhars. When the third Talak is pronounced it becomes irrevocable. In Talak-ul-bidat which is only recognized by Hanafis and not by Shias the husband may pronounce the three formulas at one time whether the wife is in a state of purity or not and this Talak becomes effective and irrevocable the moment it is given. Even the pronouncement of the formula of Talak thrice is not necessary, if the intention to make the Talak effective and irrevocable at once is apparent. Reference in this connection may be made to Amer Ali's Mohammadan Law, Vol. 11 (1929 Edition), pages 474-475 and Fais Badruddin Tyabji's Mohammadan Law, sections 134 to 142 (1940 Edition).

Ahmad Giri V. Mst. Begha, Cr. ref. No. 221/2011 D/- 7- 3- 1955, AIR 1955 J&K 1 (H. C.) D. B.

Talak — Talak-ul-bidat — Valid divorce — Right of wife to claim maintenance under S. 488 Cr. P. Code — No right to maintenance.

A valid divorce of the wife by the husband, where it is sanctioned by personal law, puts an end to the marital relation and the status of husband and wife and no order for maintenance can be made subsequent to the date of such divorce. The wife is not entitled

to maintenarce after she comes to know that she has been divorced. Hanafi school recognizes Talak-ul-bidat and in view of its being least onerous forthe husbands, it is the most prevalant form obtaining in India. Any change in this respect cannot be brought about by the Judicial interpretation. Talak-ul-bidat comes into operation at once and is irrevocable right from the moment of its pronouncement or the execution of the deed if the Talak is in writing.

Talak-ul-bidat form had been pronounced by the husband in the presence of two attesting witnesses on 12th Katik 2009 and it was sent to the wife under a registered cover addressed to her, though she refused to take delivery of it. The fact that she had been divorced came to the knowledge of the wife before she put in her application under S. 488, Cr. P. C.

Held that on the date when the wife put in her application under S. 468, Cr. P. C. she was no longer the wife of the husband and she was not competent to file an application under S. 488, Cr. P. C., demanding maintenance from a person who was no longer her husband. No maintenance could be allowed even for the period of Iddat. AIR 1930 B 178, Dissented from.

Chittaleys' Criminal P. C. cited with approval. Anno. AIR Com., Cr. P C. S. 488 N. 8.

Cases Referred :

A) AIR 1930 Bom 178, 81 Cr. LJ 110
B) 1944 Mad 227, 45 Cr. LJ 672
C) 1932 PC 25 . 135 Ind Cas 762 (PC)
D) (78) 4 Cal 588
E) 1927 PC 15 : 5 Rang 18(PC)
F) ('09) 36 Cal 184 : 1 Ind Cas 740
G) ('10) 33 Mad 22 : 3 Ind Cas 730
H) 1939 Sind 179 : 40 Cri LJ 814.

Ahmad Giri V. Mst. Begha Cr. Ref. No. 221/2011, D/- 7- 3- 1955 AIR 1955 J&K 1 (H. C.) D. B.

Temporary Stay of Debt Realization Ordinance (Ordinance No. XXI of 2004) — Section 3 — Whether revision competent from an order under section 3.

Held that an order under section 3 of the Ordinance XXI of 2004 whereby proceedings are stayed in a suit is revisable.

Rehman Kenu V. Razak Lawai & Anr. Civil Revision No. 2 Of 2005, 7 J&K LR 170 (H. C.) S. B.

Tenancy — Whether a co-sharer can have tenancy in common land.

Section 14 of the Tenancy Act lays down that a co-sharer in the common land himself cannot acquire a right of tenancy in that land against the other co-sharers.

It is not possible to contemplate a tenancy or occupancy tenancy of a share in the abstract. The very definition of the word tenant in the Tenancy Act is that he is one who holds land and there is no question, therefore of a person being a tenant of an undefined share only.

Chand & Ors. V. Bhagat Ram & Ors. Civil 2nd appeal No. 265 of 2002, 6 J&K LR Page 40 (H. C.) S. B.

Tenancy Laws — Jammu and Kashmir Tenancy Act (2 of 1980) — —

Suit by three persons owning certain piece of land for ejectment of tenant on grcund that it was required for their bonafide personal cultivation — Plaintiffs already in joint possession 28 kanals and 10 marlas of Abi and Kukshki land standing in the name of all of them — Each one of the plaintiff's cannot be said to be in cultivating possession of 17 kanals of land — Plaintiffs held were entiled to a decree.

Lachhman & Ors. V. Aziz Ganai & Ors. Revn. 1st. appeal No. 6 of 2009, D/- 8- 7- 1952, AIR 1952 J&K 54 (H. C.) S. B.

Tenancy Act — Creation of occupancy tenants or grant of occupancy rights governed by Tenancy Act and not by Transfer of Property Act.

It is but elementary that the matter with regard to creation of occupancy tenancy or grant of occupancy rights are governed by the Tenancy Act and the general provisions of the Transfer of Property Act have little or no relevancy in such matter.

Chand & Ors. V. Bhagat Ram & Ors. Civil 2nd appeal No. 265 of 2005, 6 J&K LR Page 40 (H. C.) S. B.

Tenancy Act (II of 1980) — Section 14 — No. tenancy by a co-sharer in common land — No tenancy of an undefined share.

Section 14 of the Tenancy Act lays down that a co-sharer in the common land himself cannot acquire a right of tenancy in that land against the other co-sharers.

It is not possible to contemplate a tenancy or occupancy tenancy of a share in the abstract. The very definition of the word tenant in the Tenancy Act is that he is one who holds land and there is no question, therefore of a person being a tenant of an undefined share only.

Chand & Ors. V. Bhagat Ram & Ors. Civil 2nd appeal No. 265 of 2002, 6 J&K LR Page 40 (H. C.) S. B.

Tenancy Laws — Jammu and Kashmir Tenancy Act (2 of 1980) as amended by Act 7 of 2005, S. 15 — A —

Person cultivating land and becoming tenant after the commencement of the Amendment Act 7 of 2005 — — No question of his getting rights of protected tenant arises — He can at best be a mere tenant at will.

Mohd Baba & Ors. V. Mst. Mukhti & Ors. Rev. Appeal No. 31 of 2009, D/- 24- 10- 1952. AIR 1953 J&K 14 (H. C.) S. B.

Tenancy Laws — Jammu and Kashmir Tenancy Act (2 of 1980), (as amended by act 7 of 2005), S. 15A — Claim to status of protected tenant — Proof.

Under S. 15A, before a tenant can successfully claim the status of a protected tenant he has got to prove that he had held continuously the land in dispute for a period of six years from the commencement of the Jammu and Kashmir Tenancy (Amendment)

Act (7 of 2005) that is from 4th Maghar 2005. In the alternative he has to prove that he had held the land continuously for a period of not less than seven months immediately preceding the date of commencement of that Act, that is, he must prove his cultivating possession from 4th Baisakh 2005 to 4th Maghar 2005.

Hence, if the tenant has come into possession of the land only in the year 2007 and never before, he cannot claim the status of a protected tenant.

Lachman & Ors. V. Aziz Ganai & Ors. Rev. Ist. appeal No. 6 of 2009, D/- 8- 7- 1952. AIR 1952 J&K 54 (H. C.) S. B.

Tenancy Laws — Jammu and Kashmir Tenancy Act (2 of 1980). as amended by Act 7 of 2005), Ss. 15 — C and 15 — A — — Applicability and scope of S. 15 — A — Section does not apply to lands mortgaged with possession.

Section 15 - C of the Jammu and Kashmir Act, 2 of 1980 as amended by Act 7 of 2005 provides that the provisions of S. 15 — A, Tenancy Act cannot apply to lands mortgaged with possession. Section 15 — A deals with the definition of a protected tenant and also details the reasons on the basis of which a tenant can claim the status of a protected tenant. Therefore if a tenant has been admitted into cultivating possession of some land by a mortgagee landlord, such a tenant cannot claim the status of a protected tenant.

Mohd Baba & Ors. V. Mst. Mukhti & Ors. Rev. Appeal No. 31 of 2009, D/- 24- 10- 52. AIR *1953 J&K 14 (H. C.) S. B.*

Tenancy Act (II of 1980) — Section 18 read with Section 85, Group Second (m) — "Land in suit ancestral joint Hindu family property — — Defendants, executed a deed of sale without the consent and knowledge of the plaintiffs — — Suit for possession and declaration that the sale deed is invalid as against plaintiffs' rights and for mesne profits — Issue of jurisdiction raised.

Held that a suit for the recovery of mesne profits does not lie in a Civil Court.

Further held that the record of status in the Record of Rights is not a necessary qualification. This is supported by the definition in clause (7) of section 2 of the Tenancy Act, which says "tenant" and "landlord" include the predecessors and successors in interest of a tenant and landlord respectively.

Madan Lal V. Dharam Singh Civil First Appeal No. 102 Of 2002 7 J&K LR 6 (H. C) D. B.

Tenancy Act (II of 1980) — — Section 52 — Tenant cannot be ejected from part only of a tenancy ezcept at the instance of all the landlords.

The ancestors of the plaintiffs representing a private partition among the cosharers executed a sale-deed in favour of the defendants of some plots which they thought had fallen to their share. The sale deed was of occupancy rights. The vendees were put into cultivatory possession of these plots. The sale-deed remained unregistered. The other co-sharers denied private partition and ultimately mutation in the name of the defendants was scored off

by order of the Revenue Minister and they were recorded as tenants without any category. The plaintiffs brought a suit for ejectment of tenants while other co-sharers refused to join in the ejectment proceedings and insisted on retention of tenancy.

Held, that under the circumstances it is not open to a single set of landlords in a tenancy held jointly to get an ejectment order.

Boota & anr. V. Shah Mohd & Ors. Revenue First appeal No. 8 of 2002, 6 J&K LR Page 58 (H. C.) S. B.

Tenancy Laws — Jammu & Kashmir Tenancy Act, S. 57A — Tenant ejected by person other than landlord — Tenant cannot apply under S. 57A for reinstatement.

An application under S. 57-A can be filed only if a tenant is dispossessed by a landlord otherwise than in due course of law, but if a tenant is dispossessed by a person other than the landlord he cannot invoke S. 57-A, Tenancy Act, in order to regain his possession.

Kanshi Ram & Ors. V. Bhagtu & Ors. Revenue Appeal No. 12 of 2008, D/- 23- 4- 1952, AIR 1952 J&K 44 (H. C.) D, B.

Tenancy Laws — Jammu and Kashmir Tenancy Act, S. 57A — Order under ultra vires — Interference in appeal

Where in a case to which S. 57-A has no application, the Collector passes an order reinstating a tenant-at-will who had been dispossessed by a trespasser, the order even if ultravires and illegal will not be interfered with by the Htgh Court in appeal because it would not be equitable to order restoration of possession to a person who is admittedly a trespasser.

Kanshi Ram & Ors. V. Bhagtu & Ors. Revenue appeal No. 12 of 2008, D/- 23- 4- 1952. AIR 1952 J&K 44 (H. C.) D. B.

Tenancy Act (II of 1980) — Section 66 — Irregular transfer of occupancy rights voidable — Occupancy rights transferred by a deed of sale dated 29. 11. 1994 — — Sale deed registered on 2. 1. 1995 — Suit for declaration that the sale deed was void ab initio brought on 2- 1- 2001 — Suit beyond time.

Held that under section 47 of the Registration Act a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of registration. From this it is clear that the transfer of occupanuy rights took place on 29-11-1994, and according to section 66 of the Tenancy Act the period of 6 years will begin to run from this date and not from the date of the registration of the sale deed. The suit having been brought on 2-1-2005 i. e. after 6 years one month and some days from the date of the execution of the sale deed is clearly beyond time.

AIR 1936 Cal. 17 dissented from.
1934 All. 70, 35 I. C. 347 ;
1937 Nag. I
1927 P. C. 42
1928 P. C. 86
1926 All. 549 referred to.

Bhagat Ram V. Th. Kishan Singh & Ors. Revenue IInd Appeal No. 20 of 2004, 7 J&K LR 243 (Board of Judicial Adviters).

Tenancy Act (No of 1980) :- Sections 78 and 82 — Duties of trial and appellant Courts to determine compensation under section 78 — Difference between the two sections explained.

Section 78 of the Tenancy Act makes it incumbent on the Court to elicit from a defendant in a suit for ejectment a statement of his claim to compensation if he has not claimhd it himself. No execution of the decree is to take place without repayment of compensation. The Court is further under a statutory obligation to determine compensaiton to which the defendant tenant may be entitled. It is as much the duty of a Court of appeal as that of the Court of first instance to determine the amount of compensation payable to a tenant where the tenant prefers an appeal against a decree for ejectment claiming enhanced amount of compensation. The duty of the Court of appeal is the same as is mentioned in section 78. Section 82, on the other hand, refers, to cases in which from any cause the amount of compensation payable to a tenant has not been determined before the tenant is ejected. The ejectment shall stand but the Court, which passed the decree for ejectment, shall pass an order for payment by the landlord of such compensation as may be due to the tenant. Section 82, as its language clearly provides contemplates cases in which by inadvertance or otherwise a tenant has been ejected and the Court failed to carry out the duty imposed on it by section 78 to determine Compensation and to make it payable before actual ejectment.

Mst Jani And Others V. Mandir Sri Bajrangdevji Through Baba Raghbir Dass. Civil Appeal No. 7 Of 1949. 9 J&K LR 162 (Board)

Tenancy Laws (J&K) — State Tenancy Act. Ss. 78-82. applicability of.

Section 82 State Tenancy Act can have no application to a case in which the Court has awarded compensation under S. 78 of that Act as a condition precedent to the ejectment taking effect and the tenant appeals from the whole decree.

Mt. Jani and others V. Mandir Sri Bajrangdev Ji. Appeal No. 7 of 1949, D/- 30- 5- 1950, AIR 1951 J&K 10 (Board of Judicial Advisers).

Tenancy (Stay of Ejectment) Ordinance — Ejectment proceedings started under section 50 (I) of the Tenancy Act ——— Ordinance not applicable.

Held that proceedings under section 50(I) are taken before a Revenue Court and as such the terms of the Tenant (Stay of Ejectment) Ordinance do not apply to such proceedings. It is only in suits brought under section 85 first group (a) of the Tenancy Act, 1980 by a landlord to eject a tenant that the provisions of the above Ordinance apply.

Sona Wani V. Lassi & Ors. Revenue IInd Appeal No. 3 Of 2004, 7 J&K LR 177 (H. C.) S. B,

Tort — Malicious prosecution — Requisites — Malice. meaning of — (Words and Phrases — Malice).

The plaintiff, in order to succeed in a suit for malicious prosecution, has to prove that the defendant was actuated by malice and that he had acted without reasonable and probable cause. The

mere fact that the complaint filed by the defendant against the plaintiff was dismissed and the plaintiff was discharged does not render the defendant liable for malicious prosecution. Malice has been said to mean any wrong or indirect motive but a prosecution is not malicious merely because it is inspired by anger. However wrongheaded a prosecutor may be, if he honestly thinks that the accused has been guilty of a criminal offence he cannot be initiator of a malicious prosecution. AIR 1944 PC 1, Re l. on.

Case Referred

AIR 1944 PC 1 : 42 Cri LJ 303 (PC)

Gopa V. Amarnath & Ors. 2nd Appeal No. 35 of 2011, D/- 17-2- 55 AIR 1955 J&K 27 (H. C.) D. B.

Transfer — Cr. Case — — Justified when the Magistrate confined an accused to secure presence of a co-accused in the judicial lock up — Conduct of the magistrate reprehensible.

The mere fact that the Magistrate thought that one of the accused persons was responsible for the absence of some other accused, would in no way justify the action of the Magistrate in having placed him in judicial lock up, on the contrary the Magistrate ought to have realised that depriving people of their liberty in such an unceremonious manner is nothing short of unlawful imprisonment. No provision of law exists anywhere by which a Magistrate can confine a person for the absence of another man. Anxiety to secure a speedy trial does not justify the use of such methods. The mere fact that the other accused appeared before the Court on the subsequent day of the arrest and confinement of the accused would not make the illegal act legal and shall certainly create a strong and a reasonable apprehension in the mind of the accused that a fair and impartial trial or inquiry cannot be had before the Court in which the trial is pending.

Chitaley's Criminal P. C. (Page 2907) cited with approval

Rasul Dar & anr. V. Mst. Jani, Cr. Transfer Appln. Nos. 16 and 17 of 2008 decided on 25 Sawan 2008, AIR 1952 J&K 1 (H. C.) Single Bench.

Transfer — — Suit not relating to debt as contemplated by the Distressed Debtors Relief Act as amended by Act XXIV of 2007 whether can be transferred to the Board of Conciliation under S. 29 of the Act.

Held can be so transferred.

Degambar Sain V. Pt. Lachhman Dass, Ref. No. 1 of 1951, D/- 18-6- 1951, AIR 1952 J&K 7 (Board of Judicial Advisers).

Transfer of Property Act (XIII of 1977) — Certain property mortgaged — — A money decree holder of the mortgager attached the property — Objection of the mortgagee to the attachment over-ruled Suit by the mortgagees for declaration that the property is liable to sale only subject to the mortgage — — Declaration granted by the trial Court — Subsequent to the mortgage the mortgagees had taken a sale of the property mortgaged but plea of sale was not put forward as a basis of relief by the mortgagee though mentioned the fact in the plaint — Question of the validity of sale was not subject of consideration in trial Court and was only hypothetically

advanced in argument both before the District Judge and the High Court.

Held that the issue with regard to the sole-deed should be treated as still at large and it is not necessary to express any opinion about it. For the purposes of this case the rights of the parties should be determined on the basis of the mortgage, and on the basis of the mortgage, mortgagees are clearly entitled to declaration which was given to them by the trial Court and which has been subsequently affirmed by the High Court.

Shyam Lal Jotshi V. Kothi Khazir Joo Ganai, Civil Appeal No. 12 of 1949, 8 J&K LR 86 (Board of Judicial Advisers)

(a) Transfer of Property Act (XLII of 1977) — — Creation of Occupancy tenancy or grant of occupancy rights — — Governed by Tenancy Act and not by Transfer of Property Act.

It is but elementary that the matter with regard to creation of occupancy tenancy or grant of occupancy rights are governed by the Tenancy Act and the general provisions of the Transfer of Property Act have little or no relevancy in such matter.

Chand & Ors. V. Bhagat Ram & Ors. Civil 2nd appeal No. 265 of 2002, 6 J&K LR Page 40 (H. C.) S. B.

Transfer of Property Act (XLII of 1977) — — Land in joint possession — One of the co-sharer sells his share to A who again sells it to B — Suit by B for joint possession — No prayer for delivery of any specific plot of land — Whether suit cognizable by a Revenue Court.

Held that the proposition appears to be very obvious that a person who is in joint possession of a land can transfer his interest in the joint holding to anybody and transferee having purchased the interest in the joint holding is entitled to be recorded as in joint possession with the other co-sharer in the same way and to the same extent as the transferor was entitled. The prayer in the plaint was for joint possession and not for the delivery of any specific plots of land. If by an arrangement between the share-holders either a share-holder or his transferees were allowed to remain in possession of certain plots before partition was claimed, the transferees in turn like the plaintiff wouid also be entitled to remain in possession till one of the share-holders claimed partition and such a suit alone would be exclusively cognizable by a Revenue Court.

Habib Kutoo & Ors. V. Pt. Shamlal Bhat Civil Appeal No. 6 of 1949, 8 J&K LR 31 (Board of Juaicial Advisers)

Transfer of Property Act (1882), Ss- 5 and 109 — Transfer — Meaning of — Lease — Subsequent partition between lessors — — Evidence Act (1872), S. 116.

The partition is a transfer of property within the meaning of Section 5 and Section 109 as it has been held to be a miscure of surrender and a conveyance of right in a property.

The defendant had by virtue of a rent deed taken on lease a small house from the plaintiff. The house was the part of some joint property which was owned by four persons including the

plaintiff. These persons who were related to each other as brothers or cousins effected 3 partitions of their joint property and this house which was rented out to the defendant fell to the lot of other three persons.

Held that any rights of realizing rent or ejecting the defendant which were possessed by the plaintiff once had ceased to exist so far as he was concernad and those rights were now vested in his co-sharers to whom the exclusive ownership had been transferred by partition. On the date of transfer (in this case partition) the relationship of land and tenant ceased to exist between the plaintiff and the defendant. Therefore the defendant was not debarred from pleading that he was not bound by any relationship of landlord and tenant so far as he and the plaintiff were concerned. Chitaley's T. P. Act cited with approval.

AnnoT. . P. Act, S. 5 N. 4; Evidence Act, Section 116 N. 9

Skattar Singh V. Rawela ; 2nd Appeal No, 94 of 2007 D/- 26th Poh 2008 ; AIR 1952 J&K 18 (H. C.) S. B.

Transfer of Property Aat (1882), S. 63 — A — Claim for improvements — Party allowing decree exparte — Claim cannot be entertained in appeal —

Where the defendants allowed the decree to be passed exparte against them, their submission that some improvements have been effected by them in the land in dispute cannot be entertained in appeal, Improvement may or may not be a fact, but if the lower Court has not started any inquiry into that matter the defendants need thank themselves only and none else. They should not have allowed the decree to go exparte against themselves.

(Note : But somehow or the other, it appeared to the High Court that the defendants may have made some improvements in the land. Taking into consideration all the factors involved in the case, Rs. 20/- were allowed as a compensation)

Anno. T. P. Act, S: 93 — A, N. 1 and 1a.

Mohd Baba & Ors. V. Mst. Mukhti & Ors. Revn. Appeal No. 31 of 2009, D/- 24- 10- 1952, AIR 1953 J&K 14 (H. C.) S. B.

Transfer of Property Act (1882), S. 105 — Lease and Licence compared.

In a lease there is a transfer of interest in property whereas in licence no estate in property passess and it can be revoked at any time.

Anno : AIR Com. T. P. Act, S. 105, N. 13.

Gian Kaur & Ors. V. Pro & anr Writ Petns. Nos. 255, 289 and 304 of 2011. D/- 9- 3- 1956, AIR 1956 J&K 33 (H. C.) F. B.

Transfer of Property Act, (1882), S, 106 — Notice to quit — — House Rent Control Order. R. 7. Proviso providing six months notice — Does not relieve the landlord from complying with the requirement of S. 106, Transfer of Property Act that notice must expire with the end of the month of the tenancy

Where "the local law to the contrary" provides six months' notice in place of 15 days' notice to be given by a landlord to a

tenant, for the latter's ejectment from the house, it does not relieve the landlord from that condition which is provided by S. 106, T. P. Act and which is that the notice must expire with the end of the month of tenancy.

AIR 1923 Lah 959 ; 1938 Cal 656 ; 1943 Bom 306, Rel. on
Anno' T. P. Act, S. 106 N. 40.

Vishwa Nath V. Bishen Dass, 2nd Appeal No. 42 of 2009, D/- 2-2- 1953. AIR 1953 J&K 15 (H. C.) S. B

T. P. Act (1882), Ss. 116 and 106. — — Tenant holding over without consent of lessor — Dispossession by landlord — — Subsequent obtaining of possession — — Effect — — He can be ejected without any notice.

A tenant holding over after the expiry of the period of his lease without the consent of the lessor will be treated as a tenant by sufference and can be sued for ejectment at any time without any previous notice to quit. If such a tenant is dispossessed by the lesssor and after some days he again obtains possession, the original lease will not be renewed and he can be ejected without any notice to quit as required by S. 106 :
AIR 1935 Pat. 271 Rel. on :
Chitaley's TP Act, S. 116 N. 2 Ref.
Anno ; T. P. Act, S. 116, N. 2; 13 S. 106, N. 32.

Ramzan Khan V. Ghani Sufi & anr. Second Appeal No. 51 of 2008, D/- 17 Har 2009. AIR 1952 J&K 35 (H. C.) D. B.

Trial — Not fair and improper — Suit for rendition of accounts of dissolved partnership.

Held that the findings that accounts have already been settled and no case for re-opening of accounts has been made out, cannot be arrived at without framing proper issues and without giving an opportunity to parties to produce all their evidence. There has not been a fair and proper trial of the controversy between the parties.

The case was remanded by the Board.

Kundan Lal V. L. Lachman Dass & Ors. Civil Appeal No. 8 Of 1947, 7 J&K LR 230 (Board of Judicial Advisers).

Trusts Act (1882) S. 3 — — Creaiton of trust — — (Banker and customer).

A joint Hindu family firm holding a fixed deposit for one year in defendant Bank — After expiry of period part of deposit withdrawn in cash by one of partners who was authorized to operate the account and the remaining amount together with interest was allowed to be kept in floating suspense, account in name of another partner B, on instructions of firm — Bank giving effect to these instructions with a view to conceal its inability to pay and deceive public — Bank suspending payments due to financial crisis — Scheme framed under S. 153-A, Companies Act for payment of liabilities in which fixed deposit of firm was also included — Held that unpaid balance of fixed deposit due to firm did not change its original character and no trust was created in favour of B by the transaction — B was not therefore entitled to any preference over other creditels of Bank. 34 Mad 128 Applied; 36 Mad 499,

Distinguished; Case law discussed.

Anno Trusts Act, S. 3 N. 1, 3 and 4

Punjab & Kashmir Bank Ltd. V. Sohan Lal, First appeal no. 38 of 2009. D/- 3- 3- 1953, AIR 1954 J&K 34 (H. C.) D. B.

Ultravires — — — Article 19 (1) (f) Constitution (Application to Jammu & Kashmir) Order 1954 — Ss. 14 and 15 of Right to Prior Purchase Act — Whether ultra vires of the Constitution.

In the State of Jammu and Kashmir, C 1.(7) added to Art. 19 of the Constitution under Para 4(d)(iii) of the Constitution (Application to Jammu and Kashmir) Order 1954, specially lays down that C 1. (5) of Art. 19 shall be construed as meaning such restrictions as the appropriate Legislature deems reasonable. Hence, if the Legislature has considered the restrictions to be reasonable keeping in view the fact that they are for the benefit of the State of Jammu and Kashmir to examine those restrictions in order to find out whether they are reasonable or not. The Constitution under C 1. (7) has itself ousted the jurisdiction of the Courts to examine the reasonableness of the restrictions which have been imposed by appropriate Legislature. The provisions, therefore, of Ss. 14 and 15 of the Right of Prior Purchase Act, 1993, do not contravene Art. 19(1)(f) read with the new C 1. (7) added to the Article under paragraph 4(d)(iii) of the Constitution (Application to Jammu and Kashmir) Order, 1954 AIR 1954 Hyd 161 (FB) — 1953 Punj 20 — AIR 1954 Punj 55, Ref. Anno. AIR Com., Const. of India, Art. 19 N. 20 (b) and 65.

Cases Referred:

A. AIR 1954 Hyd 161: ILR (1954) Hyd 85 (FB)

B. ,, 1953 Punj 20: ILR (1953) Punj 227

D. ,, 1954 Punj 55: ILR (1954) Punj 232 (FB)

Bolodhu V. Nanak Chand & anr Civil Revn, No. 91 of 2011, D/- 4- 4- 1955, AIR 1955 J&K 25 (H. C.) F. B.

Ultra vires — Whether J&K Big Landed Estates Act (Abolition) Act (2007) is ultravires of the powers of Shi Yuvraj.

Even assuming that there is some clash between these Acts, Art. 254 of the Constitution cannot be invoked for the purpose. Article 254 is not really applicable to the State of Jammu & Kashmir. The condition precedent for the effective application of Art. 254 is that it should relate to a provision of law in the concurrent list with respect to which Parliament has power to make laws for the State. In the absence of such power and in the absence of the application of List III of the Seventh Schedule to the State, the question of any provision of law made by the State Legislature being repugnant to any provisions of a law made by parliament which parliament is not competent to enact for the State or to any existing law does not arise and the J.&K. Big Landed Estates (Abolition) Act cannot be held ultra vires of the powers of Yuvraj on this ground.

Magher Singh & Ors. V. Principal Secretary J&K Govt. 1st Appeals No. 29 2008 and No. 4 of 2009, D/- 25- 3- 1953. AIR 1953 J&K 26 (H. C.) D. B.

Waiver — Plea of — Waiver of right of Prior Purchase — Whether procedure in Chapter IV of the Right of Prior Purchase Act of 1903 should be strictly followed.

Held that in order to raise a plea of waiver of right of prior purchase, it is not necessary that the procedure in Chapter IV of the Right of Prior Purchase Act of 1993 should be strictly followed. Waiver or estoppel may also arise under general Law of Evidence. An offer to purchase the land in dispute was made to the father of the plaintiffs and he having refused to purchase the land on the price demanded he cannot but be held to have waived his right of prior purchase.

Kashi Nath & Anr. V. Pt. Lachman Joo & Anr. Civil Orig. Suit No. 14 Of 2004, 8 J&K LR 1 (H. C.) S. B.

Waiver — Town Area Act (VII of 1997) — S. 38 (1) Proviso — Plea of want of notice taken at late stage when limitation for fresh suit had expired — — Plea waived — — Notice can be waived.

Before an action is brought against a Town Area Committe or against any servant of a Town Area Committee in respect of anything done, one month's notice has to be given to the Town Area Committee. The notice is for the protection of the Committee and it is for the committee to insist upon the notice or to waive it.

Plea of want of notice which is a clear bar to the institution of proceedings against public officer must be taken at the earliest possible opportunity and must be specifically pleaded. Where such a plea is taken by the defendant at a very late stage of the suit and at a time when the plaintiff would be precluded by the law of limitation from bringing a further suit against the defendant, the defendant must be deemed to have waived the privilege of notice. AIR 1931 Cal. 175, Rel. on AIR 1947 PC 197, Disting.

TAC Sopore V. Abdul Khaliq, Civil Revn. No. 7 of 2009, D/- 14 Sawan 2009, AIR 1952 J&K 47 (H. C.) C. J.

Will — Hindu law — Whether a Saroch Rajput who is sonless can dispose of his ancestral property by will

Held that there is no custom amongst Saroch Rajputs that a sonless Saroch Rajput cannot will away his ancestral property without the consent of his collaterals.

Punjaboo & Anr. V. Prithvi Singh & Ors. Civil First Appeal No. 28 Of 2002, 7 J&K LR 4 (H. C.) D. B.

Withdrawal of prosecution — Interference by the High Court — S. 494 Cr. P. C. reasons for consent of the Court not recorded — High Court can interfere.

The High Court of course can interfere with an order of the Court under S. 494, Criminal P. C., if the applicant succeeds in showing that the trial Court has exercised its discretion in an extremely high- handed or arbitrary manner.

Partap Chand V. L. Behari Lal & Ors. Cr. Misc. No. 259 of 2010, D/- 11- 2- 1955. AIR 1955 J&K 12 (H. C.) D. B.

Withdrawal of prosecution — S. 494 Cr. P. C. — Complaint instituted on a private complaint — — Whether public Prosecutor

who has taken charge of the case can withdraw the prosecution without consulting the complainant.

A public Prosecutor can intervene in a criminal case instituted on a private complaint. The Public prosecutor who has taken charge of the case instituted on a private complaint can withdraw the prosecution without consulting the complainant. AIR 1924 All 203. Distinguished.

Anno. AIR Com., Criminal P. C., S. 494 N. 2; 1954 Mitra, S. 494 P. 1948 N. "Who.....prosecution" (one Pt. exrra in Mitra).

AIR Com., Criminal P. C., S. 494 N. 3: 1954 Mitra, S. 494 P. 1944 N. 1808 "Withdrawal from prosecution".

Cases Referred :

A. AIR 1948 Mad 422 : 49 Cri LJ 543
B. AIR 1924 Pat 283 : 25 Cr. LJ 446
C. AIR 1938 Nag 76 : 39 Cr LJ 65
D. AIR 1933 Sind 357 : 35 Cri LJ 142
E. AIR 1932 Cal 699 : 34 Cr LJ 433
F. AIR 1924 All 203 : 25 Cri LJ 972
G. AIR 1931 Cal 607 : 33 Cri LJ 3

Partap Chand V. L. Behari Lal & Ors. Cr. Misc. No. 259 of 2010 D/- 11- 2- 1955, AIR 1955 J&K 12 (H. C.) D. B.

Withdrawal of Prosecution — — S. 494 — Cr. P. C. — Whether reasons to be recorded for the consent of the Court — — Not essential though desirable — Failure to record not an illegality.

It is nowhere stated in S. 494 that the reasons must be recorded by the Court giving its consent. It is not therefore essential for the trial Court to record its reasons for giving the consent to the withdrawal of the prosecution under S. 494, Criminal P. C; though it may be desirable to do so. Failure to record the reasons, is not an illegality and would not of itself be sufficient to vitiate the order. The High Court of course can interfere with an order of the Court under S. 494, Criminal P. C; if the applicant succeeds in showing that the trial Court has exercised its discretion in an extremely high-handed or arbitrary manner.

Anno. AIR Com; Cri. P. C; S. 494 N. 5 : 1954 Mitra, S. 494 P. 1948 N. "Record of reasons" (Different view not clearly brought out in Mitra).

Partap Chand V. L. Behari Lal & Ors. Cr. Misc. No. 259 of 2010, D/- 11- 2- 1955. AIR 1955 J&K 12 (H. C.) D. B.

Witness — Declared hostile at the instance of prosecution and cross-examined — Whether on this ground the evidence of the witness liable to be rejected totally.

The fact that the witness was declared hostile by the Court at the request of the prosecuting counsel and he was allowed to cross-examine the witness furnished no justification for rejecting en-block the evidence of the witness. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to the same.

Anno. Evidence Act, S. 154 N. 7

Badri Nath V. State. Cr. appeal No. 1 of 1952. D/- 18- 8- 1952. AIR 1953 J&K 41 (Board of Judicial Advisers)

Words and Phrases

If a person exercises powers conferred on him in bad faith or for a collateral purpose, it is an abuse of the power and a fraud upon the Statute and is not really an exercise of the power at all and a court can interfere with such colourabe exercise of power.

Waryam Singh V. State, Cr. Misc. No. 97 Of 2005, 8 J&K LR 14 (H. C.) D. B.

Words and Phrases 'Actus Curiae neminem gravabit'.

It is true that an appeal must be presented by an authorized person, and if it is presented by a person who is not authorized to do so, it shall be rejected. But, where an appeal is presented by an authorized person, but in a wrong court and that court instead of returning the appeal to the appellant, itself sends it to the proper court which accepts the presentation, the appallant should not be made to suffer for the mistakes of the Court on the principle 'actus curiae neminem gravabit:, and the appeal should not be dismissed.

Anno. C. P. C. O. 41, R. 1 N. 2.

Gangu & Ors. V. Lassa Zargar & Ors. Rev. Ist appeal no. 23 of 2008, D/- 5- 4- 54. AIR 19954 J&K 44 (H. C.) S. B.

Words and Phrases — Agnate

Agnate means a person whose relation to the deceased can be traced without the intervention of female links.

Ahmed Dar V. Mt. Mukhti, 2nd Appeal No. 16 of 2007, D/- 6- 9- 1951. AIR 1951 J&K 21 (H. C.) D. B.

Words and Phrases — 'Agricultural land' — S. 14 J&K Right of Prior Purchase Act 1993.

The words 'agricultural land' occurring in Sec. 14 include agricultural land in an equally clear that the expression "immovable property" in this section does not include agricultural land. It follows that on the literal construction of the section the owners of contiguous properties have no right of pre-emption in respect of agricural land wherever it may be situated. The words 'immovable property' in Ss. 14 and 15 were not intended by the framers of the Act to include agricultural land. Having provided by Section 14 that agricultural land, regardless of its situation, can be the subject of pre-emption by the four classes of persons therein mentioned it could not have intended that such land should be again provided for in S. 15 and the right of prior purchase given to quite a different set of persons.

Sultan Sofi & Ors. V. Shaban Sofi & Ors. Appeal No. 1 of 1951, D/- 18- 6- 1951. AIR 1952 J&K 20 (Board of Judicial Advisers)

Words and phrases — Bainama — Nazrana — Haq Maurus Dawami —

Held that the word Bainama taken with the other terms such as Nazrana and Haq Maurus leads to the conclusion that the deed has been inartistically drawn up and amounts to no more than a transfer by the proprietor of a right to enjoy the property in dispute. The terms of the document clearly fall within the definition of lease.

Gauri Shankar V. S. Gobind Singh, Civil Appeal No. 3 of 1947, 7

J&K LR 224 (Board of Judicial Advisers)

Words and Phrases — 'Belief' and 'Knowledge'

A distinction has to be drawn between the words 'belief' and 'knowledge'. A belief will be inculcated in the mind of a person by various facts, by evidence of witnesses or by inferences 'from given premises. Put not so with knowledge. Knowledge is gained by a person by making use of his perceptional faculties and is clearly distinguishable from belief.

Mulla Mahammado & Ors. V. State, Cr. 1st Appeals No. 39, 44, & 45 of 2006, D/- 23 Har 2007. AIR 1952 J&K 49 (H. C.) D. B.

Words and Phrases — 'Confirm' — Meaning of —

According to the Webster Dictionary means 'to render valid by assent.'

Gh. Rasul V. State, Misc. Appln. No. 23 of 1955. D/- 27- 9- 1955, AIR 1956 J&K 17 (H. C.) F. B.

Words and phrases — 'Custom' as used in section 3 (a) Hindu Law Inheritance (Amendment) Act XVII of 1997.

A usage, which is in derogation of law, may in certain cases mature into a custom; but a usage in accordance with law can only be referred to the operation of law and cannot give rise to a custom.

Karam Chand V. Mst. Nanki Devi, Ciuil Appeal No. 1 of 1947, 6 J&K LR page 49 (Board of Judicial Advisers)

(Prior to the enactment of Hindu Law Inheritance (Amendment) Act, 1997, sisters were excluded by Hindu Law and a custom could not grow in accordance with Law.)

Words and Phrases — Distressed debtor — Meaning of

The term 'Distressed debtor' as defined in S. 2 must be taken in relation to each debt due from him and not qua all debts due from him. The term is a relative term and a person is impressed with the character of 'distressed debtor" in relation to one or more of the debts due from him but not as regards others which do not fall within the definition.

Degambar Sain V. Pt. Lachhman Dass, Ref. No. 1 of 1951. D/- 18- 6- 1951. AIR 1952 J&K 7 (Board of Judicial Advisers)

Words and phrases — 'Dukhtar Khana Nishin' — Interpretation of —

A custom should be proved to be ancient, uniforn and continouus. It has been pointed out so many times that the pleading of a custom may not be presumed in every case and that it has to be definitely set forth and pleaded. In cases where a certain customs are very well-known and found to be generally in vogue this rule of pleading may be relaxed. In the District of Kathua the custom of a resident daughter inheriting her father's property in the same manner as a son is not at all in vogue and is never known to have been followed. The term "Dukhtar Khana Nashin" should, therefore, he interpreted in its natural meaning and not in the sense it has been acquired in Kashmir Valley in view of the custom prevailing there.

Mst. Jevani V. Ramanand, Civil 2nd Appeal No. 22 of 2008, 7 J&K LR 10 (H. C.) Single Bench.

Words and Phrases — 'Durante bene placite'

Means that the tenure of office of a Civil servant except where it is otherwise provided by statute, can be terminated at any time without cause assigned.

Gh. Rasul V. State, Misc. Appln. No. 23 of 1955, D/- 27- 9- 55. AIR 1956 J&K 17 (H. C.) F. B.

Words and Phrases — "Enemy Agent" — Enemy Agents Ordinance 2005.

Held that 'Enemy Agent' according to the definition given in the Ordinance means "a person not operating as a member of enemy aremd force, who is employed by or works for or acts on instructions received from the enemy." It is in evidence that the accused who were themselves armed, accompanied the raiders and even instigated them to shoot at the Hindus and freely participated in the orgy of loot and plunder alongwith the raiders. This by itself would bring the actions of the accused under "works for the enemy", Besides this it is not only an enemy agent who can be convicted under section 3 but section 3 of the Enemy Agents Ordinance would show that besides an enemy agent any body with intend to and the enemy does act which is designed to endanger life can be convicted under this section.

State V. Raj Mohd & Ors. Review No. 107 Of 2005, 8 J&K LR 151 (H. C.) S. B.

Words and phrases — 'enter' occurring in para (a) of S. 108 — A, Cr. P. Code.

The term "enter" should be construed alongwith the words immediately following i. e., "reside or remain." These words provide the meaning of the word "enter". A reasonable interpretation of the term "enter" obviously would be that the entry must be for the purposes of remaining or residing and not only the physical act connected by the dictionary meaning of the word.

The term "enter" occurring in para (a) of section 108-A cannot be construed in the light of the Explanation to section 442 of the Ranbir Penal Code.

In the absence of the prosecution proving to the contrary the fact, that the road was under the management and control of the Public Works Department of His Highness' Government was sufficient to give rise to the presumption that it belonging to the Jammu and Kashmir State and not to the Jagir of Chenani. The fact of it being situate within the boundaries of the Chenani Jagir would not make much of a difference in the case of a public high-way.

Jagan Nath V. Sate, Revision Cases No. 70 and 71 of 2003, 6 J&K LR page 31 (H. C.) S. B.

Words and Phrases — 'Export' — Meaning of as defined in S. 2(b) of J&K Essential Supplies (Temporary powers) Ordinance (2003).

'Export' as defined in S. 2(b) of the Ordinance has been used in a wider sense and it includes movement from one part of the

State to another.

Tek Chand Nanda V. State of J&K, Writ Petition No. 64 of 1955, D/- 2- 1- 56 AIR 1956 J&K 26 (H. C.) D. B.

Words and Phrases — 'goes armed' — S. 19 (e) and (f) — Arms Act (1878) — Distinguished from being merely in possession of a weapon.

A person carrying a revolver with four live cartridges in a bag "goes armed" within the meaning of S. 19(e) and is not merely in possession of a weapon. AIR 1925 Mad 585(1), Distinguished: 1941 Pat. 284, Rel on.

Anno. Arms Act, S. 19, N. 5.

Dina Nath V. State, Cr. Revn. No. 69 of 2010, D/- 14- 4- 1949. AIR 1954 J&K 41 (H. C.) S. B.

Words and Phrases — 'Kashmiri' — Meaning of.

The word 'Kashmiri' literally means of Kashmir or belonging to Kashmir. It does not specify any caste or class or religion and it primarily refers to the home or original home of a person. Items Nos. (1) and (18) of the list for Mirpur District have no reference to the original home to the class specified in these items.

Fazal Dad (Pltff. Applt.) V. Revenue Cr. (Defdt. Respdt) Civil Appeal No. 14 of 1947, 6 J&K LR page 150 (Board)

Words and Phrases — Lavald used in His Highness Ailan No. 23 of 12th Har, 1985 — Whether equivalent to 'without heirs' as used in English version.

Held that the word 'Lavald' has been used loosely in Urdu version of the Ailan and the equivalent of this word (issueless) has not been used in the English version. The expression 'without heirs' used in the English version is undoubtedly more in accord with the intention underlying the Ailan that where under the law of inheritance a case escheat arises Hish Highness will forego the right thus accruing to him in favour of the entire body of co-sharers. The Ailan was an act of grace to commemorate the happy occasion of his Coronation and it could not have been the intention of His Highness to deprive any one who, but for the Ailan, would have been entitled to inherit.

Rassia And Ors. V. Pt. Lachmi Dass And Ors. Civil Appeal No. II Of 1948, 9 J&K LR 169 (Board).

Words And Phrases —— 'Lawalad'

In R. 63 of the standing Order No. 23 of the Revenue Department which is in English and reproduces the Ailan the equivalent of "Lawalad" is not used. It uses the expression 'without heirs' and is undoubtedly more in accord with the intention underlying the Ailan. The word "Lawalad" has been used loosely in the Ailan, and the intention was that where under the law of inheritance a case of escheat arises His Highness will forego the right thus accruing to him in favour of the entire body of cosharers. It was an act of grace to commemorate the happy occasion of his Coronation and it could not have been the intention of His Highness to deprive any one who but for the Ailan, would have been entitled to inherit. Hence the plaintiffs are bound to prove that a Hindu died not

only without leaving no issue but further that he left no heir under the Hindu Law so that a case of escheat arose: 12 Moo. Ind. App 448 (P. C.), Reld. on.

Rassia & Ors. V. Kachmi Dass & Ors. Appeal No. 1 of 1948, — D/- 1-8- 1950. AIR 1951 J&K 23 (Board of Judicial Advisers)

Words and Phrases — 'Malice' meaning of —

The plaintiff, in order to succeed in a suit for malicious prosecution, has to prove that the defendant was actuated by malice and that he had acted without reasonable and prabable cause. The mere fact that the complaint filed by the defendant against the plaintiff was dismissed and the plaintiff was discharged does not render the defendant liable for malicious prosecution. Malice has been said to mean any wrong or indirect motive but prosecution is not malicious merely because it is inspired by anger. However wrongheaded a prosecutor may be, if he honestly thinks that the accused has been guily of a criminal offence he cannot be initiator of a malicious prosecution.

AIR 1944 PC 1, rel. on.

Case referred

1944 PC 1 : 45 Cri LJ 303 (PC)

Gopa V. Amar Nath & Ors. 2nd Appeal No. 35 of 2011, D/- 17-2- 55. AIR 1955 J&K 27 (H. C.) D. B.

Words and phrases — "Owner of Mahal' in S. 14 (c) Right of prior purchase act (II of 1993).

There is nothing in the language of section 14(c) of the Right of Prior Purchase Act, 1993, to warrant the assumption that the direct proprietor of land in dispute should be deprived of the right of pre-emption and preference be given to owner of other land in the same Mahal. The proprietor or owner of a Mahal may have certain peculiar rights under the Tenancy Act but that would not debar him from exercising other rights if available under other enactments.

Syed Karar Hussain & Anr. V. Syed Feroz Ali Shah & Ors. Civil IInd Appeal No. 145 Of 2003, 6 J&K LR page 67 (H. C.) S. B.

Words and Phrases — 'Property' — Within the meaning of J&K State Evacuees (Administration of Property) Act (2006) — — — Interest of allotee whether is

An allottee under J & K. State Evaucees, (Administration of Property) Act (2006) has no insignia or characteristics of proprietary rights vested in him in respect of land allotted to him. Whatever may be the interest of an allottee in the land, it does not constitute 'property' as used in Art. 19(1)(f) of the Constitution of India. Hence ejectment of an allottee from the land allotted to him would not amount to infringement of his fundamental rights vested in him underx Art. 19(1)(f).

Anno: AIR Com. Const. of India, Art. 19 N. 59.

Gian Kaur & Ors. V. PRO & Anr. Writ Petitions Nos. 255, 289 and 304 of 2011, D/- 9- 3- 1956. AIR 1956 J&K 33 (H. C.) Full Bench.

Words and Phrases —— 'Rent' — Provincial Small Cause Courts Act (1887) — Art. 8.

The word 'rent' is used in respect of immovable property like land, house and shops. The word 'rent' therefore, has distinct meaning from the word 'hire' and unless suits for hire are specifically excluded from the cognizance of Court of Small Causes it cannot be held that the suit for hire would not lie in the Court of the Small Causes. Thus the suit for the recovery of hire for boats is not excepted under Article 8: 7 Ind. Cas 553 (Cal), Rel on

Anno. Pro. S. C. Act Att. 8 N. 2.

Radha Kishen V. Sona Khandi, Civil Rev. No. 46 of 2007, D/- 26 Jeth 2008, AIR 1952 J&K 15 (H. C.) D. B.

Words and Phrases — "Sufficient cause' in Section 5 Limitation Act — What is

Held that when a mistake is not after due care and attention it cannot be said to be sufficient cause for the delay. Nothing shall be done in good faith which is not done with due care and attention.

Suraj Bhat V. Jia Lal Bhat, Civil IInd Appeal No. 305 Of 2003, 7 J&K LR 110 (H. C.) D. B.

Words and Phrases — 'Transfer' —— Meaning of —— Transfer of Property Act (1882). Ss. 5 and 109.

The partition is a transfer of property within the meaning of Section 5 and Section 109 as it has been held to be a miscure of surrender and a conveyance of right in a property.

The defendant had by virtue of a rent deed taken on lease a small house from the plaintiff. This house was the part of some joint proporty which was owned by four persons including the plaintiff. These who were related to each other as brothers or cousins effected a partition of their joint property and this house which was rented out to the defendant fell to the lot of other three persons.

Held that any rights of realizing rent or ejecting the defendant which were possessed by the plaintiff once had ceased to exist so far as he was concerned and those rights were now vested in his co-sharers to whom the exclusive ownership had been transferred by partition. On the date of transfer (in this case partition) the relationship of land and tenant ceased to exist between the plaintiff and the defendant Therefore the defendant was not debarred from pleading that he was not bound by any relationship of landlord and tenant so far as he and the plaintiff were concerned. Chitaley's T. P. Act cited with approval.

Anno. T. P. Act, S. N. 4; Evidence Act, Section 116 N. 9

Skattar Sing V. Rawela, 2nd Appeal No. 94 of 2007, D/- 26th Poh, 2008. AIR 1952 J&K 18 (H. C.) S. B.

Words and Phrases — Uberrima fides — Meaning of — Suppression of facts

'If on the argument showing cause against a rule nisi, the Court comes to the conclusion that the rule was granted upon an affidavit which was not candid and did not fairly state the facts, but

State them in such a way as to mislead and deceive the Court. there is power inherent in the Court, in order to protect itself and prevent an abuse of its process, to discharge the examination of the merits. The rule of the Court requiring uberrima fides of the part of an applicant for an exparte injunction applies equally to the case of an application for a rule nisi for a writ of prohibition.

Gh. Rasul V. State, Misc. Appln. No. 23 of 1955. D/- 27- 9- 1955. AIR 1956 J&K 17 (H. C.) F. B.

Writ Petition — Article 32 (2A) Constitution of India as applied to the State of Jammu and Kashmir — — Maintainability when other remedy available.

The remedy provided in Art. 32(2A) of the Constitution of India as applied to the State of Jammu and Kashmir cannot be used as a substitute for ordinary remedies. If a statute provides a remedy for a wrong, resort must be had to that remedy.

It is, therefore, clear that where there is another remedy open to a party, the High Court should be very reluctant in granting extraordinary remedy by way of a writ but in exceptional circumstances where a party is likely to suffer irreparable loss due to delay which may occur by pursuing the ordinary remedy, the High Court may in extraordinary circumstances grant a speedy remedy by way of a writ. In Jamnu and Kashmir State Evacuees' (Administration of Property) Act there is remedy provided under S. 3(-A by way of revision to the Custodian General. In face of the remedy provided under the Act, the High Court will not entertain a writ petition against an order cancelling an allotment except in extraordinary circumstances where the petitioner satisfies the Court that the remedy provided will not be effective and that he will suffer irreparable loss if remedy by way of a writ is not granted. 1953 Pat 112 and 1954 Punj 165 Rel. on. Anno: AIR Com. Const. of India, Art. 226, N. 19(d).

Cases Referred :

AIR 1951 Punj 327 : 53 Pun LR 5
1954 Punj 165 : ILR (1954) Punj 923
1954 SC 282 : 1954 SCR 1005.
1952 SC 192 : 1952 SCR 583.
1953 Bom 195 : ILR (1953) Bom 614
1953 Pat 112 : 32 Pat 131.

Gian Kaur & Ors. V. PRO and anr. Writ Petitions Nos. 255, 289 and 304 of 2011, D/- 9- 3- 1956. AIR 1956 J&K 33 (H. C.) F. B.